Supreme Court, U.S.
FILED
APR 14 2006
OFFICE OF THE CLERK

No. 05-1322

In The

Supreme Court of the United States

ADAM PALINSKI,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the prosecution's failure to disclose the lead investigator's report it possessed which detailed petitioner's false confession to an unrelated offense a violation of the petitioner's due process rights when petitioner claimed his confession was false in case at bar?

2. Did the trial court abuse its discretion in violation of the petitioner's due process rights when it allowed the prosecution to use detailed testimony about the underlying facts of petitioner's arson conviction at his trial for solicitation of murder?

3. Does presentation of detailed factual testimony of an alleged aggravated battery at petitioner's sentencing for arson and solicitation of murder violate petitioner's Fifth Amendment rights prohibiting double jeopardy when the court states the evidence was used to enhance the penalty imposed and future sentencing would be consecutive?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Adam Palinski prays that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court, Second District, affirming his convictions for arson, aggravated arson, solicitation for murder and remanding for trial of the charge of aggravated battery.

OPINIONS BELOW

The Illinois Appellate Court, Second District's order affirming the petitioner's conviction is unpublished and attached hereto in Appendix A. The order of the Illinois Supreme Court denying the petitioner's petition for leave to appeal is unpublished and attached hereto as Appendix B.

JURISDICTION

The Illinois Appellate Court, Second District, affirmed the convictions and sentences of the petitioner on charges of arson, aggravated arson and solicitation for murder and remanded the aggravated battery charge for trial on October 21, 2005. Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court on November 25, 2005 which was denied on January 25, 2006. This petition is timely, having been filed within ninety days of the Illinois Supreme Court's order denying leave to appeal to that court. Jurisdiction is conferred by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution states in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law.

STATUTES INVOLVED

Illinois Compiled Statutes Ch. 730 § 5/5-8-4 provides in pertinent part:

> (h) If a person charged with a felony commits a separate felony while on pre-trial release or in pretrial detention in a county jail facility or county detention facility, the sentences imposed upon conviction of these felonies shall be

served consecutively regardless of the order in which the judgments of conviction are entered.

STATEMENT OF THE CASE

1. Petitioner Adam Palinski was charged by indictment with arson and aggravated arson on April 9, 2002. The indictments allege petitioner set fires on the night of March 18, 2002 which damaged St. Michael's Catholic Church and the home of Barry Brennan, both located in Wheaton, Illinois.

Prior to trial petitioner moved to supress his confession. On October 15, 2003 the motion was denied. I Supp.R. 638.[1]

Petitioner properly disclosed Dr. James Corcoran as an expert witness. Dr. Corcoran would have testified about his diagnosis of petitioner's narcissictic personality disorder and offer the opinion that this condition leads petitioner to engage in grandiose lies about himself and his accomplishments. The trial court granted the prosecution's motion in limine to exclude Dr. Corcoran's testimony. I Supp.R. 242.

[1] This appeal is a consolidation of three lower court cases against petitioner: Circuit Court number 02 CF 833 – Arson, Aggravated Arson and Residential Arson; Circuit Court number 02 CF 2346 – Solicitation to Commit Murder for Hire; and Circuit Court number 02 CF 3690 – Aggravated Battery. For reference to the various transcripts pages, the Arson records are referred to as I Supp.R., the Solicitation records will be referred to as II Supp.R. and the Aggravated Battery records will be referred to as III Supp.R.

The case proceeded to jury trial. No direct evidence linked petitioner to the crimes. The most incriminating evidence against petitioner, and the center of the prosecution's case in chief and argument, were petitioner's statements to Detective William Cooley of the Wheaton, Illinois Police Department. Detective Cooley led the investigation of the fires.

Detective Cooley testified he first had contact with petitioner at the Wheaton Police Station at about 11:30 a.m. on March 21, 2002. I Supp.R. 868. Cooley testified he and Detective Wayne Simpson conducted an interrogation of the petitioner which began with biographical questions and reading of *Miranda* rights. I Supp.R. 514-20.

Cooley stated he had an initial two and one-half hour conversation with petitioner. I Supp.R. 521-2. Cooley described petitioner's demeanor during the entire interrogation as cooperative, relaxed and communicative. I Supp.R. 522. During this time petitioner denied involvement in the arsons until he was confronted with a conflict in his account of his whereabouts on the evening of the fires. I Supp.R. 877-8. Cooley stated petitioner then admitted to going inside St. Michael's and starting a fire and later starting several fires on the outside of the Brennan house. I Supp.R. 881-90.

Cooley left the room for a short break and upon his return asked petitioner to provide a summary statement; consent was given to video tape the statement. Petitioner gave an approximately twenty-five minute recorded statement. I Supp.R. 524. The statement detailed an account of the evening of March 18, 2002 which specifically implicated petitioner as the sole perpetrator of the arsons.

Cooley described the investigation of the fires which took place over several days before the interview occurred. I Supp.R. 904. Cooley acknowledged on cross examination that the video was a production he led petitioner through created from a list of things the detective wanted to make sure were recorded to "shore things up." I Supp.R. 921. Some of the content came from Cooley's earlier investigation.

Petitioner testified on his own behalf and denied involvement with the fires. I Supp.R. 1110. Petitioner asserted the interrogation continued despite his denials until he agreed to recite on video a made-up story about setting the fires. I Supp.R. 1115-6. Palinski admitted the video accurately depicted what he said at the end of his interrogation but denied it accurately depicted the whole interrogation or the truth regarding the events of March 18, 2002. I Supp.R. 1118.

At the time of his arrest petitioner was studying film making and acting in college. I Supp.R. 1119. He described his gift for fiction and how it often spilled over into his life as lies he told about himself. I Supp.R. 1121. He explained he had been diagnosed with narcissistic personality disorder which led him to engage in grandiose exaggerations about himself as well as including himself in events he was not a part of. I Supp.R. 1124.

All other evidence at trial is summarized in the appellate court ruling. App.A. On November 6, 2003 a guilty verdict on all counts was returned by the jury. I Supp.R. 273.

During preparation for petitioner's trial on the charge of solicitation of murder counsel requested a supplemental report. The document had been referenced in a prosecution

disclosure but not disclosed. The request was made November 13, 2003 and the prosecution disclosed the report that day.

The report memorialized an interrogation of the petitioner which occurred on August 16, 2002 in the DuPage County Jail while he was in custody for the arson cases. It was conducted by Detective Garlish of the DuPage County, Illinois, Sheriff's Department. A source in the jail had tipped the detective that petitioner was claiming responsibility for the murder of John Conrad. The intent of the interrogation was to determine if petitioner had been involved. I Supp.R. 293-8; II Supp.R. 98. Detective Cooley was present for the interrogation.

During the interview petitioner confessed to the murder. It was immediately determined that he was lying because he misstated the basic facts of the murder and identified an individual in a picture as being the deceased who was not. When confronted with the inaccuracies petitioner told the investigators he confessed because "he thought that was what (they) wanted to hear." He confided that the statements he previously made in the jail implicating himself in the murder had been made in order to make himself "look cool." I Supp.R. 293-8; II Supp.R. 98.

On November 17, 2003 petitioner filed an emergency motion seeking a new trial. As it was central to his defense that the confession to committing the arsons was false he argued the prosecution's failure to disclose the report was the withholding of favorable and relevant material and that the inability to use the information produced a verdict unworthy of confidence. Specifically he contended the report would allow further pursuit of a psychological

defense and a more thorough cross examination of Detective Cooley regarding the facts and circumstances surrounding the confession. I Supp.R. 293-8. The court ruled any psychological issue could be resolved by laymen and that the nature of petitioner's defense had been coerced confession, not false confession. The motion was denied. II Supp.R. 357-9.

2. On September 5, 2002 an indictment for solicitation of murder for hire charged petitioner with seeking to have Thomas Motier killed.

Motier testified for the state in the arson prosecution about two conversations between himself and petitioner. The first conversation occurred March 19, 2002 in which petitioner told him he had caused the St. Michael's fire. I Supp.R. 1019. The second conversation occurred March 20, 2002 and was taped pursuant to an overhear warrant. In it petitioner discussed burning down St. Michael's and setting fire to the Brennan house. I Supp.R. 1026.

Prior to trial the court granted petitioner's motion to bar admission of evidence about the arson from the solicitation of murder trial stating: "Any testimony regarding that case number, et cetera is out." II Supp.R. 359. The ruling was qualified in that: " . . . they may . . . lay the foundation that there was an actual event that occurred so that any evidence in this case is not about some fictional event. They can show proof of the fire." II Supp.R. 360.

The solicitation trial began November 18, 2003. During the prosecutor's opening statement to the jury petitioner's counsel made two separate motions for a mistrial alleging the state was violating the court's ruling by extensively detailing the facts of the arsons. II Supp.R. 466-71. The motions were denied.

Detective Cooley was called to testify and further described the March 18, 2002 fires. He provided great detail about the contents of the overhear evidence and petitioner's statements about the arson. II Supp.R. 494-7. Petitioner's counsel objected, relying on the court's rulings on the pretrial motions. Each objection was overruled, in effect expanding the limitations of the original ruling in each instance.

Thomas Motier testified he was petitioner's friend and during a casual conversation on March 18, 2002 petitioner admitted to Motier he started the St. Michael's fire. II Supp.R. 1019. Motier went to the police with this information and they secured a warrant to eavesdrop on subsequent conversations. The tape of the March 20, 2002 phone conversation between petitioner and Motier in which the former discussed burning down St. Michael's and setting fire to the Brennan house was played for the jury. II Supp.R. 1026.

Cooley stated he interviewed Ray Garvin, Sean Rosner and Frank Saunders about the suspected solicitation. II Supp.R. 499. They were housed near petitioner at the DuPage County Jail during his pretrial incarceration. II Supp.R. 501.

Garvin agreed to tape conversations with petitioner in the jail between July 15 and August 15, 2002. II Supp.R. 501-3. Cooley indicated telephone conversations between petitioner and Kristie Karles, his girlfriend, were also taped. II Supp.R. 504-6. Approximately thirty tapes were generated containing two total conversations which relate to Motier. II Supp.R. 521.

Cooley admitted recruiting petitioner's former girlfriend Jen Williams to offer petitioner money he needed to

consummate the solicitation. II Supp.R. 508-13. Cooley testified that on August 13, 2002 petitioner told Garvin he was not interested in any arrangement. II Supp.R. 521. During the conversations between Williams and petitioner on August 14 and 15, 2002, he refused to accept money for the solicitation before relenting to Williams' urgings. II Supp.R. 517-8.

Petitioner's counsel attempted to cross examine Cooley about the false confession to murdering John Conrad but was stopped by the court upon objection of the prosecution. II Supp.R. 651.

Garvin admitted on cross examination that his testimony against petitioner was quid pro quo for a much reduced sentence on a burglary charge. He admitted that petitioner never approached him about killing Motier. II Supp.R. 596.

Sean Rosner testified petitioner asked him to kill "Tommy," further stating that in jail you had to talk tough to survive. II Supp.R. 541.

Frank Saunders testified petitioner said he was indicted in the arson cases because his friend Tom wore a wire and he was looking for help killing Motier. II Supp.R. 544-7. Saunders indicated that if you talk in jail you must talk tough. II Supp.R. 548.

Detective Tony Davis of the DuPage County Sheriff's Office testified posing as a hit man to petitioner after the conversations with Williams took place. II Supp.R. 634. A tape was played for the jury in which he and petitioner set up a "hit" on Motier. II Supp.R. 635.

All other evidence at trial is as summarized in the appellate court ruling. App.A. A guilty verdict was returned by the jury. II Supp.R. 723.

3. The arson, aggravated arson and solicitation for murder counts proceeded to a combined sentencing hearing on December 23, 2003.

Among evidence presented in aggravation the prosecution called Deputy Leo Penkala of the DuPage County Sheriff's Department. Penkala is the alleged victim of an aggravated battery for which petitioner had been charged but that had not yet gone to trial. Penkala's testimony detailed the factual basis of the alleged aggravated battery. II Supp.R. 731-8.

The court sentenced the petitioner to 6 years, 10 months on the arson, 15 years on the aggravated arson (to be served concurrently to the arson) and 24 years on the solicitation of murder (consecutive to the arson and aggravated arson). II Supp.R. 792.

On February 11, 2004 petitioner filed a motion to dismiss the aggravated battery indictment based on double jeopardy. III Supp.R. 82. On February 18, 2004 the trial court granted the motion finding that the deputy was put on for the sole purpose of enhancing the sentence and specifically stating that the court considered the offense in determining the sentences. III Supp.R. 113.

On February 23, 2004 the state filed a motion to vacate the order dismissing the indictment. III Supp.R. 91. On March 11, 2004 the trial court granted the state's motion. III Supp.R. 101. Leave was granted for interlocutory appeal. III Supp.R. 100.

REASONS FOR GRANTING THE WRIT

I. THE STATE'S WITHHOLDING OF EXCULPATORY EVIDENCE IN ITS POSSESSION UNTIL AFTER THE CONCLUSION OF THE TRIAL FOR ARSON AND AGGRAVATED ARSON CONSTITUTES A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

Nothing in law or procedure prevents the exercise of certiorari jurisdiction. The disclosure of the reports relating to the interrogation of the petitioner in possession of the prosecution only after the cause had been decided by a jury requires review of the violation of the due process protections afforded the petitioner.

Petitioner has raised a federal issue throughout post trial proceedings. Due process requires prosecutors to disclose to a defendant any information within its possession or control which tends to negate the guilt of the defendant as to the offense charged. *Brady v. Maryland*, 373 U.S. 83 (1963).

Central to the petitioner's defense to the arson charges was that he made a false confession to the crimes. This was clear throughout every phase of the proceedings and the subject of motion practice long before trial. The admissibility and credibility of the confession became the centerpiece of pretrial litigation for both sides as no direct evidence of petitioner's involvement exists.

No argument is made to the factual core of the petitioner's allegations. Detective Cooley was the lead investigator of the arsons and the individual who took petitioner's statement regarding those allegations. He was present during the interrogation of the petitioner by Detective Garlish regarding the murder of John Conrad.

The prosecution possessed the reports of the interrogation prior to trial.

The prosecution was acutely aware the defense intended to argue the petitioner habitually fabricated stories to aggrandize himself in the eyes of others and made statements simply to placate his interrogators. They proceeded on a motion in limine to eliminate Dr. Corcoran's expert opinion about petitioner's narcissistic personality disorder and his tendency to engage in grandiose lies while knowing petitioner falsely confessed to murdering Conrad in order to please his interrogators.

The principle of *Brady* is to avoid unfair trials of a defendant by guaranteeing all proceedings comport with the standards of justice. *Brady* at 87, 88. Specifically it deems suppression of evidence favorable to the accused at either trial or sentencing by the prosecution a violation of due process rights irrespective of the motive for, or mode of, suppression. *Brady* at 87. The rule established in *Brady* requires the tendering of all information in control or possession of the prosecution which is favorable and material. *Moore v. Illinois*, 408 U.S. 786, 794 (1972).

Prior to trial petitioner properly demanded disclosure of all *Brady* materials. The due process rights elucidated in the *Brady* decision protect defendants not only from suppression by the prosecution of directly exculpatory evidence but also evidence that leads to light being put upon the credibility of the prosecutions evidence.

Impeachment evidence is specifically included in the construct of the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 153-4 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985). This Court in *Bagley* relied on *Napue v. Illinois*, 360 U.S. 264 (1959) which held that a jury's

estimation of the veracity of a witness' testimony is a key element to the decision of a jury. Disclosure of potential fodder for cross examination is required since possible untruths in testimony could determine a defendant's liberty. *Bagley* at 676.

The prosecution's duty exists regardless of the existence of a specific request by the defendant where the information is obviously exculpatory. *United States v. Agurs*, 427 U.S. 97, 106-7 (1976). In this case the information was relevant, material and so obviously favorable that the prosecution devoted a great deal of time and energy trying to limit the defendant from presenting information about his false confession in his defense.

The intent of the prosecution in failing to disclose evidence is not pertinent as defendants need only show that a non-disclosed item could have been developed by skillful counsel to induce a reasonable doubt for jurors. *People v. Owens*, 36 Ill.App.3d 1049, 1056, 344 N.E.2d 525. The information withheld by the prosecution in this case could easily have been so developed. It aids as a cross examination tool to challenge the credibility of Detective Cooley. It strengthens the position regarding the use of an expert to examine the credibility of the statement itself. The integrity of a tribunal rests on the accused's ability to challenge the declaration of a witness attempting to prove an allegation against him. *Crawford v. Washington*, 451 U.S. 36, 51 (2004).

In its decision the Illinois Appellate Court, Second District, relied primarily on six cases: *People v. Heard*, 187 Ill.2d 36 (1999), *People v. Weaver*, 92 Ill.2d 545 (1982), *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), *Fullwood v. Lee*, 290 F.2d 663 (4th Cir. 2002), *West v. Johnson*, 92

F.3d 1385 (5th Cir. 1996) and *United States v. Diaz*, 922 F.2d 998 (2nd Cir. 1990). The reliance on these cases is a misapplication of state and federal jurisprudence.

Heard and *Weaver* define the premise that if no prejudice to the defendant appears then error is not reversible and no prejudice exists if he knows of the evidence. The cases are easily distinguished from the petitioner's. For instance, *Weaver* involves evidence that was inculpatory. *Weaver* at 558.

The other cases are no more relevant.

Gauger was a civil action by a defendant convicted through the use of a confession that was either coerced or entirely made up by the investigators. *Gauger* at 360. The question before the court was whether the state had a duty to either tender a truthful account or to create truthful exculpatory evidence. The court held this is not a violation because since the statement was either not made or untruthful the defendant would be able to elicit that at trial. *Gauger* at 360. The Court in *Gauger* spells out the factual difference in its own opinion when it states that the "problem was not that evidence useful to him was being concealed; the problem was that the detectives were giving false evidence." *Gauger* at 360.

The Court relied on *Fullwood*, *West* and *Diaz* to define the limits of *Brady*. These cases do not bear on petitioner's assertions given the stark factual differences. The court in *West* faced facts similar to *Gauger*, determining that the prosecution had no duty to disclose that the confession was false. *West* at 1398. The distinction from petitioner's case is the same as in *Gauger*. Petitioner does not demand the State admit his confession was false, simply that they

provide him the existing tools known to them to allow him to prove so himself.

Fullwood examines a prosecution's non-disclosure of defendant's cocaine use prior to the commission of the offense. The court found that a reasonably diligent investigation by the defense would produce such information. *Fullwood* at 686. This is not a well-reasoned analogy to this case. Due to the mental state requirements of criminal law and the guidelines for mitigation at sentencing any reasonable defense attorney would ask a client about a nexus between drug use and the commission of an offense. It is inconceivable that an attorney would so deeply probe the mind of a client as to ascertain details of every police encounter in their background.

Diaz examines whether the defendant should know a witness would testify that he was not in a particular place at a particular time. The court finds it is not a discovery violation because defendant knows the truth of his location and is not denied the advantage of using the information. *Diaz* at 1007. The defendant's knowledge of information falsely proffered by a state's witness directly relating to an element of the offense is dissimilar from the facts in this case. Cooley does not mention petitioner's other confession at all.

The logic put forth by the Illinois Appellate Court, Second District would require defendants to understand the exculpatory nature of information surrounding the facts and circumstances of a confession. This would require criminal defendants to have the same analytical skills and knowledge of the rules of evidence as counsel.

The reliance upon excluding evidence known to a defendant from *Brady* materials is wholly misplaced in

this case. Petitioner knows only of his action – the confession to a crime he did not commit. It is not solely the petitioner's act which is the pertinent part of the withheld disclosure. It is the knowledge of Detectives Cooley and Garlish that petitioner would say what he believed they wanted to hear which matters. The report containing their observations and conclusions is the needed thing, and the petitioner has no knowledge of this.

If it is this Honorable Court's belief that the report was sufficiently in the control of the petitioner then the issue must still be seen as a due process violation because the information is essential to the state's use of the confession. Defendants have the right to put before the jury the circumstances surrounding their confession because the jury is the ultimate arbiter of the confessions weight. Keeping this related information from the defendant is a failure at the most rudimentary level of justice. The credibility of Detective Cooley is an important factor in the determination of the guilt of petitioner and suppression of this evidence justifies a new trial. See, *Giglio* at 154.

The jurisprudence of this Honorable Court specifically chooses not to delineate between exculpatory and impeachment evidence. *Bagley* at 676. There is also the added weight of protecting the defendant's fundamental Constitutional right to confront witnesses against him about their motive, interest and bias in giving testimony. In similar factual situations this Court has supported the position that denial of effective cross examination by a party's suppression of evidence is reversible error. *Davis v. Alaska*, 415 U.S. 308 (1974).

With the prosecution's knowledge that they were presenting a case to the jury which relied heavily upon the

petitioner's statements for success, the duty to disclose information which would help the jury determine the credibility of those statements is obvious. The impact of the violation is incalculable on the petitioner's right to defend himself.

The misapplication of relevant jurisprudence by the Appellate Court of Illinois, Second District warrants review by this Court.

II. THE TRIAL COURT'S DECISION TO ADMIT EXTENSIVE EVIDENCE ABOUT THE ARSONS AT PETITIONER'S TRIAL FOR SOLICITATION OF MURDER ABUSED ITS DISCRETION TO ALLOW CONTEXTUAL EVIDENCE IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

Petitioner raises a question both federal and Constitutional in nature making proper an exercise of certiorari jurisdiction on the issue of evidence of the arsons being used against petitioner at his subsequent trial for solicitation of murder.

Petitioner sought to have all evidence of the arsons excluded from the solicitation trial through motions in limine. The court denied the motion to bar the audio tape of Palinski's conversation with Motier but granted the motion to bar testimony about the arsons with the qualification that " . . . they may talk about some of the events as we describe them. So, lay the foundation that there was an actual event that occurred so that any evidence in this case is not about some fictional event. They can show proof of the fire." II Supp.R. 360.

As stated the trial court's decision is appropriate. Contextual evidence is allowable where necessary for the

presentation of a logical case relating to the charged offense. "Other crimes" evidence is only admissible where it has met the standard of admission for a proper purpose. *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

The violation arises from the application and adaptation of the court's ruling. At trial the prosecution was allowed to present specific facts of the arsons in its opening statement to the jury. During their case in chief they presented testimony about petitioner's statement and information about the fire itself and the damage it caused. It is questionable if any evidence was relevant and certainly details and statements were not. It was clear from the presentation that the prosecution was not laying a logical context for the case but was attempting to combat petitioner's entrapment defense with other crimes evidence.

Evidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's propensity to commit crime. Such evidence is objectionable because a jury might convict a defendant merely because it feels he is a bad person deserving punishment. *People v. Manning,* 182 Ill.2d 193, 230 Ill.Dec. 933, 695 N.E.2d 423 (1998).

Evidence admitted to rebut entrapment defenses must be relevant to a defendant's predisposition to commit the charged offense specifically. Such relevance may be demonstrated by the similarity of the crimes charged and by proximity in time of commission. The court should exclude evidence when its prejudicial effect outweighs its probative value. *Manning,* at 214-15.

At petitioner's trial the court initially applied the standard for admitting contextual evidence allowing the state to show the relation of the petitioner to the alleged

target of the solicited murder. The ruling was evidence of the arsons would be admitted only to prove they happened, but the court allowed a high level of detail to be presented to the jury and argued by the prosecution.

Admission of these facts as "other crimes" evidence was not addressed and is inappropriate since there is no similarity between arson and solicitation to commit murder. The court allowed the prosecution to evade the rules by going beyond allowed contextual evidence to the presentation of highly dubious and prejudicial evidence that the petitioner is a bad person.

The extensive testimony detailing the fires was devastating to the petitioner's case and an abuse of discretion. It denied the petitioner due process of law by ensuring that the jury would not decide his fate by weighing only evidence of the allegations against him but by judging his character inappropriately.

Review of the decision of the Appellate Court of Illinois, Second District by this Honorable Court is warranted.

III. RELIANCE BY THE COURT UPON FACT SPECIFIC EVIDENCE OF AN ALLEGED AGGRAVATED BATTERY WHEN DETERMINING PETITIONER'S SENTENCE FOR ARSON, AGGRAVATED ARSON AND SOLICITATION OF MURDER CONVICTIONS PROHIBIT FURTHER PROSECUTION FOR THAT CRIME AS A VIOLATION OF DOUBLE JEOPARDY BECAUSE OF THE ILLINOIS MANDATORY CONSECTUTIVE SENTENCE STATUTE.

Throughout the proceedings petitioner has raised federal and Constitutional questions to the courts in

seeking to preserve the prohibition of double jeopardy. Nothing in law or procedure prevents the exercise of certiorari jurisdiction.

On January 14, 2004 an indictment charged petitioner with aggravated battery, a felony. The alleged battery occurred in the DuPage County jail where the petitioner was in custody prior to his trials for arson, aggravated arson and solicitation of murder. Under Illinois law individuals who commit a felony while in pretrial detention for a separate felony will serve the sentences for those offenses consecutively. Illinois Compiled Statutes Ch. 730 § 5/5-8-4 (2004).

At petitioner's sentencing for the arson, aggravated arson and solicitation of murder convictions the prosecution presented the alleged victim of aggravated battery who testified in great detail as to the facts of that offense. The court made it clear in the record that it considered this and increased petitioner's sentences based on that consideration. II Supp.R. 113. This is further evidenced by the trial court's initial decision to grant petitioner's motion to dismiss the aggravated battery indictment based on double jeopardy.

The initial test for the attachment of jeopardy is an examination to determine if the issue involves one act which constitutes a violation of two statutory provisions and whether either provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Further examination must be made for the possibility of sentencing issues attaching jeopardy. If offenses permit the imposition of consecutive sentences, successive prosecutions can be barred where the second prosecution

requires re-litigation of factual issues. *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

Presentation of testimony regarding the aggravated battery and seeking sentencing enhancement as a result constitutes litigation, presentation of factual issues and punishment for a pending charge.

The Illinois Supreme Court has stated "The constitutional guarantee against double jeopardy affords separate protections against three things: (1) a second prosecution after acquittal; (2) a second prosecution after conviction; and (3) multiple punishments for the same offense." *People v. Stefan*, 146 Ill.2d 324 (1992).

Defendant was subject to a minimum sentence of 26 years in prison and was ultimately sentenced to 39 aggregate years. The judge made it clear that he relied on the testimony regarding the aggravated battery in setting the sentence. If the judge increased the sentence even one day because of the aggravated battery the petitioner is subject to multiple sentences for the same offense since any further sentence must be consecutive under Illinois law.

Review of the decision of the Appellate Court of Illinois, Second District by this Court is warranted.

CONCLUSION

WHEREFORE Petitioner Adam Palinski respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to vacate or review the judgment of the Illinois Appellate Court, Second District, remand for

some further consideration or grant any other appropriate relief.

Respectfully submitted,

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Nos. 2-04-0082, 2-04-0084 and 2-04-0249 cons.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit) Court of Du Page County
Plaintiff-Appellee,	) No. 02–CF–883
ADAM PALINSKI	) Honorable
Defendant-Appellant.	) Perry R. Thompson,) Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit) Court of Du Page County
Plaintiff-Appellee,	) No. 02–CF–2346
ADAM PALINSKI	) Honorable
Defendant-Appellant.	) Perry R. Thompson,) Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit) Court of Du Page County
Plaintiff-Appellee,	) No. 02–CF–3690
ADAM PALINSKI	) Honorable
Defendant-Appellant.	) Perry R. Thompson,) Judge, Presiding.

RULE 23 ORDER

(Filed Oct. 21, 2005)

After a jury trial, defendant, Adam Palinski, was convicted of arson (720 ILCS 5/20-1(a) (West 2002)) and aggravated arson (720 ILCS 5/20-1.1(a) (West 2002)). He was convicted in another jury trial of solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2002)). He was given concurrent sentences of 6 years 10 months for the arson and 15 years for the aggravated arson. He was sentenced to 20 years' imprisonment, to run consecutive to his arson sentences, for his solicitation conviction. He filed his timely appeal to this court in both the arson case (No. 2-04-0082) and the solicitation case (No. 2-04-0084) During his imprisonment for the above-mentioned convictions, defendant was charged by indictment with the offense of aggravated battery against a correctional officer (720 ILCS 5112-4(b)(6) (West 2002)). He filed a motion to dismiss the indictment based on double jeopardy, and he now appeals the trial court's denial of that motion (No. 2-04-0249). The three appeals have been consolidated for our review, and we consider each in turn. For the reasons that follow, we affirm.

The Arson Case: No. 2-04-0082

Defendant was charged with arson in connection with the burning of St. Michael's Church in Wheaton in the early morning of March 18, 2002, and he was charged with aggravated arson in connection with the burning of his neighbor's home that same morning. The church burned to the ground, and the home was charred in several places. Police began to suspect that defendant was involved in causing the fires after receiving a tip from defendant's

acquaintance, Thomas Mottier. After hearing defendant brag about burning down the church, Mottier agreed to allow police to record a telephone conversation between him and defendant in which defendant boasted about the arson he committed on the church and on his neighbor's home. Defendant was arrested shortly thereafter, and, after police interviewed him for approximately 2½ hours, defendant agreed to provide a confession on video tape.

The facts surrounding the interrogation are in dispute. Defendant filed a motion to suppress the videotaped confession, and, as part of its hearing on the motion, the trial court saw evidence and heard the testimony of Officer Wayne Loster; Officer Ron Fuqua; Detective William Cooley; and Paul Palinksi, defendant's father.

Loster testified that he had been assigned to stake out defendant's house after being briefed on defendant's suspected involvement in the recent arson incidents. Loster followed defendant from his residence to a train station, where he and another officer arrested defendant and took him back to the Wheaton police station. Loster testified that defendant asked him what was going on and that Loster replied "that [defendant] probably knew what was going on, and that when we back [sic] to the station, we explained to him in detail." Upon arriving at the police station, Loster and the other officer removed defendant's handcuffs and escorted him to an interview room. Loster testified that defendant never asked for an attorney during this period of time.

Officer Ron Fuqua testified that he saw Loster and the other officer escort defendant to the interview room and that Fuqua asked defendant if he wanted anything to

drink. Fuqua stated that defendant requested coffee but never requested a lawyer.

Detective William Cooley testified next. He stated that he and another detective entered the interview room around 11:35 a.m. on March 21, 2002. Cooley obtained some background information from defendant (such as his age and address) before advising him of his *Miranda* rights at approximately 11:38 a.m. Defendant does not contest that he was apprised of his *Miranda* rights or that he knowingly waived them by signing the police department's *Miranda* waiver form. Cooley stated that, up to that point, defendant did not indicate in any way that he wanted a lawyer. According to Cooley, defendant did "[ask Cooley] if [defendant] needed an attorney. [Cooley] advised him that [Cooley] could not provide him with legal advice, that was a decision that [defendant] had to make." Cooley testified that defendant then indicated he would speak with police.

Cooley and the other officer then interviewed defendant for approximately 2½ hours, during which time, according to Cooley, defendant neither indicated he wanted a lawyer nor gave the name of a lawyer. In fact, Cooley stated, other than defendant's initial inquiry asking whether he needed a lawyer, defendant never mentioned anything about a lawyer or about not wanting to speak with police. Cooley described defendant's demeanor during the interview as "[v]ery cooperative, relaxed, communicative."

After the 2½ hour interview, the officers and defendant took a break for approximately one hour, during which time, according to Cooley's testimony, defendant was provided with food, soda, and an opportunity to use

the bathroom. The officers then asked defendant if he would be willing to preserve his statement either on video tape or in writing, and defendant indicated that he was willing to provide a videotaped confession. Cooley stated that the officers left the interview room and set up the video equipment before returning to the room approximately 20 minutes later, rereading defendant his *Miranda* rights, and explaining to defendant that they were going to videotape his statement. Defendant then provided a confession on video. On cross-examination, Cooley stated that defendant told him about some previous problems with depression, but Cooley said he was unaware of any medication defendant might have been taking at the time of his confession. During the entire encounter, Cooley did not recall defendant ever requesting his wallet (which defendant later claimed contained his attorney's phone number).

The final witness to testify at the hearing on defendant's motion to suppress his videotaped confession was his father, Paul Palinski. He testified that defendant had attempted suicide four years prior to his arrest and that, at the time of defendant's arrest, Paul was concerned about defendant's mental health. Paul also indicated that defendant was taking medication at the time of his arrest. Paul testified that approximately two weeks after defendant's arrest, defendant asked him to look in defendant's wallet to see if it contained a card or piece of paper with an attorney's name on it. Defendant's father testified that he found such a card in his son's wallet. On cross-examination, Paul agreed that defendant had graduated high school and attended various universities after his suicidal incident.

After hearing the testimony and seeing the evidence, the trial court denied defendant's motion to suppress the videotaped statement. The court stated that "the direct evidence is that [defendant] * * * asked a question of Officer Dooley in the middle of given [sic] his *Miranda* warnings." The court found that "[t]his is not asking for help [in the form of a lawyer]. This is just saying, hey, do I need a lawyer." The trial court then found as a matter of fact that there was no evidence that defendant asked for a lawyer or asked for his wallet to try to secure his attorney's name. It found that defendant was alert, bright, and oriented during his confession, and it found that defendant acknowledged his rights and chose to make a confession.

After the trial court ruled, it allowed defendant to reopen his motion to suppress his confession so that defendant could testify. Defendant testified that he asked Detective Cooley if he needed an, attorney and that Cooley answered that he could not advise defendant on that question. Defendant testified that he was requesting an attorney at that point. He also testified that, at some point in the middle of the interview, he told the interviewing officers that he would not answer a question without his attorney present. Defendant further testified that, later in the interview, he told the officers he would like to see his attorney and that the officers responded by telling him that "they had information basically saying that I was guilty, and that I was best making a confession." Defendant also said that he told the officers he had a note in his wallet with his attorney's name on it, and he said that, upon his requesting his wallet so that he could obtain his attorney's contact information, the officers told him they would either contact the attorney or bring defendant a

phone so that he could contact the attorney. On cross-examination, defendant acknowledged that he did not request an attorney during his videotaped confession.

After hearing this new testimony, the trial court again denied defendant's motion to suppress his confession. It found that defendant's demeanor during his videotaped confession did not "fit with a person who has asked for and been denied their [sic] Fifth Amendment right to an attorney." The court found that the defendant did not request an attorney and that his confession was voluntary.

Before the start of trial, the State filed a motion in *limine* seeking to bar defendant from offering the testimony of Dr. James Corcoran, who had conducted a fitness examination on defendant for the purpose of determining whether defendant was mentally fit for trial. Defendant offered Corcoran's testimony as evidence relating to the facts and circumstances surrounding defendant's confession and also to support defendant's assertion that his narcissistic personality disorder makes him prone to lying. The trial court noted that Corcoran could not be "a time concurrent witness to any of [defendant's] statements [in confessing to the arson]" because the confession occurred approximately one year before Corcoran examined defendant. It further noted that any opinions Corcoran could give would be based solely on what defendant told him one year after the confession, thus barring the State from effective cross-examination. The trial court then granted the motion in *limine* and barred Corcoran's testimony. It later denied defendant's motion to reconsider.

After the arson trial began, defendant filed a motion in *limine* to bar the State from entering portions of his journal into evidence. The trial court excluded some

journal entries as being too far temporally attenuated to be relevant to defendant's state of mind at the time the arsons were committed, but it stated that it would allow journal entries within six months of the arsons to be admitted, so long as the entries were not unduly prejudicial to defendant. The trial court allowed the jury to hear the following quotes, dated November 20, 2001 (approximately four months before the arsons):

> "I want to destroy something beautiful I have this overwhelming urge to destroy something and just be bad. Call it misplaced teen angst or hormones or evil, or whatever – I am full of this fire though. And it's burning out of control."
>
> "I'm pissed off and want to act out my rage."

At trial, Detective Cooley testified regrading [sic] his interview of defendant Cooley testified that defendant initially told him that he was with friends the night of the fire and that one of his friends drove him home early in the morning. Cooley then told defendant that the friends he had been with both told police that defendant walked home. The church and the neighbor's house were both along the path defendant took home, and the fires at both locations were started during the time period in which defendant would have been walking home.

Cooley said that, after being confronted with his lie about being driven home, defendant lowered his head and stated he had just lost his only alibi. Defendant then described to Cooley his actions inside the church, which we now relay according to Cooley's testimony. He told Cooley that he entered the church through an unlocked door and, after using the bathroom, entered the sacristy (a church area the priests use for storage and as a place to prepare

for their sermons), where he found a bottle of wine and began drinking it. Defendant then used a lighter to light altar cloth on fire, and he noted that the cloth burned several inches before extinguishing itself. Defendant next stood behind the pulpit and gave a mock sermon, and, after that, he played some songs on the church piano. Defendant later defaced a bible and unsuccessfully tried to steal a chalice from the church's tabernacle. As defendant returned the wine to the church refrigerator in the sacristy, he noticed a book of wooden matches laying on the floor under the refrigerator. Defendant flicked lit matches in the air, and some landed in two garbage cans containing what defendant described as tissue and white-colored flowers. After starting fires in the garbage cans, defendant left the church. Defendant's description of the church and the items inside was mostly consistent with that given by a priest who described the church in earlier testimony.

Defendant next described his activities around his neighbor's house at the end of his walk home that night. He told Detective Cooley that he felt his neighbors exhibited a lack of consideration to the neighborhood, which had helped feed and house his neighbors when their house had burned down a year earlier. He then told Cooley that, as he passed the house, he decided to light it on fire as well. Defendant removed a gas can from his own garage and then splashed gasoline in four or five areas of his neighbor's residence. Defendant then lit three of the areas, and he returned to his home as he watched particles of his neighbor's vinyl siding begin to burn. Defendant also told Detective Cooley that he had told Mottier about his burning the church and the residence, even though police had yet to reveal to defendant that they had recorded the

conversation in which defendant admitted his crimes to Mottier.

On cross examination Cooley stated that the police had other suspects in the arson of the church and defendant's neighbor's home before defendant confessed to starting both fires. Later evidence showed that another suspect police had questioned had an alibi on the night of the fires: his mother said he did not leave his house and his younger sister, who awoke in the middle of the night and walked through her house, testified that she saw him asleep in his room early in the morning.

The State also presented the testimony of Thomas Mottier. He stated that he had befriended defendant while they were sophomores in high school and that, during a telephone conversation with defendant on March 18, 2002, defendant asked him if he had heard about the church burning down. Mottier then went to defendant's house and, during the visit, defendant admitted burning down the church. According to Mottier's testimony, defendant told him that he burned the church down on his way home from his friends' house late at night and that he did so by throwing matches into open garbage cans inside the church.

Mottier testified that, on March 19, after talking to his parents, he decided to contact the police, and he thereafter agreed to cooperate in allowing the police to eavesdrop on a conversation between him and defendant. On March 20, Mottier called defendant while the police recorded the conversation.

The taped conversation begins with Mottier and defendant engaging in introductory conversation, before Mottier broaches the topic, of the church fire. Mottier

asked defendant, "[D]id you see the papers [referring to the church fire]?" Defendant responded that Mottier should save his copy of the newspaper as a "souvenir" for defendant. Mottier then asked, "How did you get in there?" Defendant responded that "it is always open." After further prodding from Mottier, defendant described entering the church to get out of the cold and then wondering, "What can I do, like, in this church? * * * What kind of trouble can I cause without them knowing it's me?" Defendant described finding matches under the refrigerator in the sacristy and then beginning to start fires in the church:

> "So I was like, 'Okay, matches!' I'm like, 'Lets take this bottle of wine over here, let's sit by the altar, and let's light the tablecloth on the altar on fire.' So I light the tablecloth on fire, and I'm like, 'Ooh, watch it burn! Watch it burn!' And it goes, like, halfway up and then stops and I'm like okay –"
>
> * * *
>
> Defendant: "And then I went over to, like, the hanging tapestries and I'm like 'Let's see if they burn!' They burnt, [Laughing.] You know, they just, like the fire just kinda slowly creeped up or whatever."
>
> Mottier: "Yeah."
>
> Defendant: "And then I'm like, 'Ooh!' ya know, like, 'More fire.' I go in the back and I'm like, I just start lighting matches and throwing them in the garbage can, lit.
>
> * * *

Defendant: "And just I'm like, there's this garbage can next to the refrigerator." Mottier "Mm-hmm."

Defendant: "There's this garbage can, like, like, directly behind me too"

Mottier: "Yeah."

Defendant: "And I'm just, like, lightin' matches."

Mottier: "Mm-hmm."

Defendant: "I'm like, throwing a couple into the garbage can, and then I notice that, like, the garbage can, like, starts, like, you know, a few things light on fire. Paper or whatever."

Motier [sic]: "Yeah."

Defendant: "I'm like, 'Cool!' You know, like, 'Fire!' So I turn around, and there's like * * * other garbage cans filled with, like, dead flowers or something like that."

Mottier: "Mm-hmm."

Defendant: "You know, just like, white petals from a flower or like tissue or something like – "

* * *

Defendant: "So, I'm just like, 'Oh! I bet this'll burn!' Light one match, throw it in there. It's like 'Poof!' I'm like, 'Oh.' "

Mottier: "God."

Defendant: "I'm like, out like walking around again –

Mottier: "Yeah."

Defendant: " * * * Then I walked back into the sacristy. And these fires were fucking raging in the garbage cans now. You can hear like [imitating noise].

Mottier: "Shit."

Defendant: "And like smoke is just like starting to fill the church. And I'm like, 'Fuck! I'd better get out of here.'"

* * *

Defendant: "I left and the fires were, like, burning dude. I had no idea the whole church would go up like that."

Defendant did not mention playing the piano, giving a sermon, or defacing a bible in his conversation with Mottier but he did brag about drinking the wine from the church refrigerator. Defendant then admitted to Mottier that he attempted to burn down his neighbors' house:

Defendant: "I got home, and I decided to do [defendant's neighbors]. I didn't tell you this, did I?

Mottier: "No."

Defendant: "I did [defendant's neighbors] too."

* * *

Defendant: Did I tell you how [defendant's neighbors] house got arsoned?

Mottier: "No."

Defendant: "That was me [Laughing]."

Mottier: "Oh my God. What did you do?"

Defendant: "[Laughing]. I don't know how I thought of this. I don't know how I thought of this. But I went into my garage and took the can of gasoline."

Mottier: "Right."

* * *

Defendant: "And I started dousing the house with gasoline. In, like, spots. At first by the garage."

Mottier: "Mm-hmm."

Defendant: "And then I poured some gasoline on, like, the vinyl siding."

Mottier: "Right"

Defendant: "And then, like, [laughing] lit it with my lighter."

Mottier: "Oh my God."

Defendant: "And watched it go 'Poof!' "

* * *

Defendant: "And I did it, like, five more times to different places on the house."

Mottier: "Oh my God."

Defendant: "And then I just ran into [defendant's parent's] garage with the gas can and put it back."

* * *

> Defendant: "As I was like putting [the gas can] back, I hear like fire engines going '[imitating sound.]' And I was like, 'That's probably for the church.'"
>
> Mottier: "Oh my God."
>
> Defendant: "[Laughing]. Then I just went inside and, like, made some food and fuckin' ate. * * * And all the time I hear more and more fire [engines]. But I didn't think anything of it, ya know."
>
> * * *
>
> Defendant: "I just wanna, like, go up to the Wheaton police and be like, 'Oh, it is arson.' '[Imitating police officer] How do you know?' '[Imitating himself] Because I did it!' And laugh and run off, ya know."

At one point in the conversation, Mottier asked defendant if he was serious about his story. Defendant laughed and replied, "Yeah. No, I would just make this up. Be like, 'Yeah, blab blah blab, you know the church? I burnt it.'" Defendant also told Mottier that he was so drunk that night that his anger towards the church came back to him as he passed it. Defendant said that the type of treatment he received in Catholic school "scars kids," and that "case in point, dude, look what happened * * * . I happened." Defendant told Mottier he did not feel bad about burning the church down because, after the church received insurance money and money from the dioceses, it would be able to rebuild.

On cross examination, defendant's attorney suggested to Mottier that defendant regularly lied to Mottier and that defendant's claim of burning down the church came

only after Mottier himself claimed to have burnt down the church. Mottier denied these allegations and testified that defendant was not in the practice of "tell[ing] all sorts of stories" to Mottier. Mottier also denied defendant's attorney's suggestion that Mottier and defendant habitually engaged in "talk[ing] trash," or telling each other things about themselves that were not true.

The State also admitted defendant's videotaped confession into evidence. The video begins with defendant acknowledging his waiver of his *Miranda* rights. On the video, defendant admitted lying to police about how he had gotten home the night of the fire. He said that the reason he lied is because he wanted an alibi and he knew "what [he] did" on his walk home was "very incriminating." Defendant then explained that he entered the church via an unlocked door on the west side of the church. He initially entered the church simply to get out of the cold. Defendant said that, upon entering the church, he found the refrigerator, with a bottle of wine inside, in the sacristy. Defendant then described lighting a tablecloth on the church altar on fire and watching it burn and then extinguish quickly. According to his statement in the video, defendant next activated the church microphone and pretended to give a lecture at the podium and then played the church piano. After that, and after defacing a bible, defendant returned the wine to the refrigerator in the sacristy. Defendant described finding a box of matches under the refrigerator and lighting and flicking the matches around the church. He said that some of the matches went into garbage cans that were filled with white flowers. According to defendant's videotaped confession, he left the church after flicking the matches, and he

did not realize that the fires were still burning in the garbage cans.

The video next shows defendant describing his burning his neighbor's house on his way home. He said that he took a gas can from his own garage and poured gas on each side of his neighbor's garage door and also on the back porch steps. Defendant then lit the spots with his lighter. He stated on the video that the flames went out quickly because his neighbors had vinyl siding. The detective on the video asked defendant if he recalled burning the east side of the house, but defendant stated that he did not recall doing so.

After admitting to both arsons, defendant was asked if he had anything else to say. He stated that he wanted to stay on the "straight and narrow," but that, unfortunately, he has a tendency to "overindulge" in alcohol and drugs, which impair his decision-making. He said that he did not think what he did would burn down the church, but it did. He also said that words could not express his desire to take back his actions.

At trial, defendant disputed the veracity of both his videotaped confession and his admissions to Mottier. He offered the testimony of his mother, Susan Palinski, who stated that defendant did not smell like gasoline when she saw him the morning after the alleged arsons took place. However, defendant later testified that he washed his hands before going to bed on the night of the fires. Police analysis of defendant's clothes confirmed that they contained no traces of gasoline.

Defendant also offered the testimony of his father, who stated that the gas can defendant claimed to have used to start fires around his neighbor's house leaks very

heavily when it pours. He stated that he did not observe any of the items around the gas can to have been moved, and he said that he did not detect any spilled gas in the garage. He did not testify that he had any reason to think the can had been poured inside the garage, but he stated that he would know if someone removed the gas can, used it, and then returned it.

Defendant also testified on his own behalf. He denied setting fire to either the church or his neighbor's home, and he stated that he told Mottier that he had set the fires because he was upset about an ended relationship with an ex-girlfriend and about the fact that he and Mottier "hadn't really been talking all that much." Defendant claimed that "all of [his] friends were abandoning [him] and [he] was starved for attention * * * ." He testified that he thought lying to Mottier about the fires would "get him interested back in [defendant's] life again * * * . "Defendant said that he and Mottier were driving together past the remains of the church when Mottier claimed to have burnt the church down. Defendant continued his recollection: "And I said, no, you didn't, I burnt [sic] the church down. And from there, basically I went on and fabricated a story saying that I went in and took wine out of the sacristy and drank it and then lit a few garbage cans on fire."

Defendant explained that he was able to integrate details about the inside of the church into his story by virtue of his familiarity with the church from his prior attendance there. Upon later questioning, he admitted that he had not been back in the sacristy of the church since 1999, but he claimed that he was confident that his description would be accurate because nothing would have changed between 1999 and March 21, 2002.

Defendant then explained why he initially lied to police about how he got home from his friend's house the night of the fires:

> "Basically, like I told the police, I knew I didn't have an alibi. They were asking me questions about a serious crime. I thought it would be better, just to be on the safe side, because I knew I had walked by the church alone, it would be better to tell them that [a friend] had driven me home."

Defendant claimed that, after the police confronted him with his lie, he told them the truth – that he had walked by the church and "nothing had happened" but that the police refused to accept his version of events. Defendant testified that he made up a story about how he had gone into the church, drank wine, played the piano, preached at the podium, and lit various things on fire. Defendant admitted that, at the time of his videotaped confession, police had not told him that his conversation with Mottier had been recorded. However, defendant testified that he knew Mottier had gone to the police, because "when Detective Cooley asked [defendant] at what point in time did [he] go into the church, [defendant knew that it had to have come from [Mottier because [Mottier] is the only person that would have known that, since [defendant] made that up." Defendant said that he confessed to police only because they broke him down, but he admitted that he knowingly waived his right to remain silent during the interview.

Defendant claimed that he and Mottier habitually "talk[ed] trash" with one another and told each other outrageous stories about themselves. Defendant described some of the fabrications he had told Mottier, including

various imagined sexual exploits, an incident in which defendant attempted to steal several cars, and a story in which defendant "killed two people for a guy named Luigi, who was purportedly in the Mafia." During his testimony, Mottier acknowledged defendant's claim to have killed for the Mafia, but he dismissed it because "[defendant] was wasted at the time [he told the story]."

Defendant explained his journal entries by stating the journal was related to a class assignment, and, when his grade began to slip, he "tried to fill in with more colorful journal entries and whatnot."

Defendant asserted that he has a tendency to lie to people because he has been diagnosed with narcissistic personality disorder, which means that he has "grandiose allusions [sic], which means [he] like to place [himself] in unreal situations. [He] like[s] to make [himself] seem something [he's] not, make life more action packed, because for [him] reality just doesn't cut it."

After deliberation, the jury returned a verdict of guilty against defendant for both arson of the church and aggravated arson of his neighbor's home. After the close of the trial, the defense learned of a report of a police officer not involved in the arson prosecution; his report indicated that defendant confessed to a murder he did not commit because he thought it was what the interrogating police officer wanted to hear. Detective Cooley was present at the time of the false confession. Defendant moved for a new trial based on the non-disclosure of this new evidence, but the trial court denied defendant's motion, because the evidence that defendant confessed to placate a police officer was "opposite" the defense theory that defendant confessed to the arsons because police had broken him

down. The court also stated that the evidence of defendant's lying about the murder would have been just "another example of a time [defendant] may have exaggerated or puffed or lied * * * ."

Defendant raises five issues on appeal in relation to his arson convictions[1], and we consider each in turn.

Defendant argues that the State's failure to turn over the officer's report of defendant's false confession in the murder case constitutes a violation of due process. See *Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Collins*, 333 Ill. App. 3d 20, 21 (2002) (*Brady* codified in Illinois under Supreme Court Rule 412(c) (188 Ill. 2d R. 412(c)).

To establish a *Brady* violation, defendant must demonstrate that the evidence not disclosed to him was both favorable to him and material. *People v. Hobley*, 182 Ill. 2d 404, 432 (1998). Evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Hobley*, 182 Ill. 2d at 432, quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494, 105 S. Ct. 3375, 3383 (1985). A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome. *Hobley*, 182 Ill. 2d at 433, quoting *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494, 105 S. Ct. at 3383.

The State argues, and we agree, that defendant suffered no prejudice from the non-disclosure of his unrelated false confession because he himself knew of the false

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[1] Defendant was sentenced for his arson and solicitation convictions during the same hearing in the trial court. His appeal of those sentences is considered below.

confession regardless of whether the police report detailing it was disclosed to him. While we note that the prosecution must disclose even defendant's statements in discovery (188 Ill. 2d R. 412(a)(ii)), non-disclosure of such statements does not amount to reversible error where it does not result in prejudice to the defendant (E.g., *People v. Heard*, 187 Ill. 2d 36, 63 (1999)). Thus, while a defendant may be prejudiced by non-disclosure of his statements where he does not know the prosecution intends to present evidence of those statements as testimony (see *People v. Weaver*, 92 Ill. 2d 545, 557-60 (1982) (reversing for a new trial because prejudice resulted by State's failure to disclose that victim's sister would testify concerning an admission by defendant)), he is not prejudiced where he is fully aware of exculpatory evidence but fails to elicit the evidence at trial. Accordingly, courts have denied defendants' *Brady* claims where the defendants either knew or should have known of the essential favorable facts underlying undisclosed evidence. *Gauger v. Hendle*, 349 F. 3d 354, 360 (7th Cir. 2003) ("duty to disclose [under *Brady*] falls out, because [the arrestee arguing a *Brady* violation] knew what he had said at the interrogation"); *Fullwood v. Lee*, 290 F. 2d 663, 686 (4th Cir. 2002) (equating *Brady* requirement of materiality with requirement of prejudice to the defendant, and holding that "[c]ertainly * * * information that is not merely available to the defendant but is actually known by the defendant would fall outside the *Brady* rule"); *West v. Johnson*, 92 F. 3d 1385, 1398-99 (5th Cir. 1996) (evidence is not suppressed if defendant knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence); *U.S. v. Diaz*, 922 F. 2d 998, 1007 (2d Cir. 1990) ("there is no improper suppression within the meaning of *Brady* where the facts are already known by the defendant"). Indeed, in *West*, 92

F. 3d 1385, the defendant argued that a *Brady* violation occurred as a result of the prosecution's suppression of unspecified evidence that defendant claimed would have established that part of his murder confession, in which he stated he stole a necklace from the victim, was false. The court held that "[the defendant] knew whether or not he had taken the necklace" and denied his claim, because "'[e]vidence is not suppressed [under *Brady*] if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'" *West*, 92 F. 3d at 1399, quoting *Lawrence v. Lensing*, 42 F. 3d 255, 257 (5th Cir. 1994).

We hold likewise here. Because defendant knew that he falsely confessed to an unrelated murder charge, he suffered no prejudice from the State's non-disclosure of a police report detailing that confession.

At oral argument, defendant argued that his Narcissistic Personality Disorder, which is discussed more fully below, prevented him from being able to meaningfully cooperate with his defense attorney by informing him of a previous false confession. There is nothing in the record to establish that defendant has any mental disorder that would prevent him from cooperating in his defense. This argument strikes us more as a challenge to defendant's fitness to stand trial. See 725 ILCS 5/104-10 (West 2004) ("A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense"). Defendant disavowed any unfitness issues before the start of trial, and a fitness examination on defendant indicated that he was fit for trial. Of course, defendant's attorney did not learn that defendant previously falsely confessed until *after* trial, and he was not

aware of the problem when be abandoned defendant's unfitness argument. However, defendant presented no expert or other evidence in his motion to reconsider or to this court to establish defendant's unfitness. Thus, while we do not foreclose the possibility that a defendant's unfitness might cause there to be prejudice in State nondisclosure of evidence defendant was aware of, we need not address the issue here, because no such unfitness was demonstrated.

In his petition for rehearing, defendant argues that we mischaracterize his contention at oral argument and that his actual contention is that no defendant should be expected to appreciate the legal significance of evidence such as the false confession here. However, though defendant criticizes the rule stated in the federal cases cited above, he does not offer any contrary authority to establish that a defendant should be able to assert a *Brady* violation based on exculpatory evidence of which he knew or reasonably should have known. Therefore, we reject defendant's argument.

Defendant's second contention on appeal is that his confession should have been suppressed because the police ignored his requests for an attorney during interrogation. Under the Fifth Amendment privilege against self-incrimination, statements made by a suspect as a result of in-custody interrogation are not admissible as evidence to establish gilt unless the court finds that the suspect waived his *Miranda* rights prior to making the statements. *People v. Krueger*, 82 Ill. 2d 305, 310 (1980), citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed 2d 694, 86 S. Ct. 1602 (1966). Even if a suspects statements are made with a voluntary, knowing, and intelligent waiver of his *Miranda* rights, if a suspect indicates in any matter and at

any stage of the interrogation process that he wishes to consult with an attorney before speaking, there can be no further questioning. *Krueger*, 82 Ill. 2d at 310, quoting *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707, 86 S. Ct. at 1612.

Defendant first argues that his asking Officer Cooley whether he needed an attorney was an invocation of his right to counsel. Because the Facts relating to this-argument are undisputed and the only question for our review is the legal effect of defendant's question, our review is *de novo*. *People v. Watson*, 315 Ill. App. 3d 866, 876 (2000); see *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001) (applying bifurcated standard of review wherein manifest weight review applies to trial court's findings of fact, but *de novo* review applies to ultimate legal question).

We disagree with defendant's position. Not every "reference to an attorney, no matter how vague, indecisive, or ambiguous, should constitute an invocation of the right to counsel." *Kruger*, 82 Ill. 2d at 311. Thus, the State cites several cases in which a defendant mentioned an attorney during custodial interrogation but nevertheless was found not to have invoked his Fifth Amendment right to counsel. See *People v. Evans*, 125 Ill. 2d 50, 73-76 (1988) (no invocation where defendant inquired as to the availability of a public defender but then agreed to talk); *Kruger*, 82. Ill. 2d at 310-12 (no invocation where defendant stated "maybe I need a lawyer" and "maybe I ought to talk to an attorney"); *People v. Wheeler*, 226 Ill. App. 3d 1092, 1096, 1098-99 (1992) (no invocation where defendant stated that her attorney "would be mad at her" if she spoke with police); *People v. Tuckett*, 150 Ill. App. 3d 406, 418-19 (1986) (no invocation where defendant stated that he "might be

needing" an attorney and that he "probably should" obtain counsel); *People v. Winston*, 106 Ill. App. 3d 673, 683-84 (1982) (no invocation where defendant expressed uncertainty about talking to police because telling his lawyer instead of police would be more advantageous to him). Likewise, we hold that defendant did not invoke his right to counsel by asking police whether he needed an attorney.

In so holding, we further note that, upon hearing defendant's question, Cooley advised defendant that he would have to make a decision as to whether or not to invoke his right to counsel, and, after being so advised, defendant continued to speak and did not make further mention of a need for an attorney. Thus, Cooley made defendant aware at the time of the questioning that his question did not invoke his right to counsel.

In so holding, we also distinguish *People v. Rafac*, 51 Ill. App. 3d 1, 4 (1977), upon which defendant relies in his assertion that his confession was unconstitutionally obtained. In *Rafac*, before confessing to burglary, the defendant asked police how he could obtain a lawyer. *Rafac*, 51 Ill. App. 3d at 3. The court held that the confession was obtained in violation of *Miranda*, because the defendant had indicated an interest in obtaining counsel. *Rafac*, 51 Ill. App. 3d at 4. In the current case, by contrast, defendant asked whether, not how, he should obtain counsel.

Defendant second argues that the trial court erred in finding as a matter of fact that defendant did not request an attorney during his interrogation. As stated above, the trial court's findings of fact in a motion to suppress will not be reversed on appeal unless they are against the manifest weight of the evidence. See *Sorenson*, 196 Ill. 2d

at 431 (2001) (applying bifurcated standard of review wherein manifest weight review applies to trial court's findings of fact, but *de novo* review applies to ultimate legal question). Here, the trial court placed more credence in Cooley's testimony that defendant did not request an attorney than in defendant's testimony that he did request an attorney. Especially considering defendant's entire defense was based on the fact that he is an incredible liar, we cannot say that the trial court's credibility determination was against the manifest weight of the evidence. The trial court did not err in finding that defendant did not request an attorney during interrogation.

Defendant's third contention on appeal of his arson conviction is that the trial court erred in barring him from presenting Dr. Corcoran's testimony. The trial court barred the testimony because Corcoran could not be a times-concurrent witness to defendant's confession. Defendant argues that Corcoran should have been allowed to testify regarding defendant's narcissistic personality disorder and how it affects his penchant for lying. We disagree.

A defendant has the right to present evidence to a jury that affects the credibility or weight to be given a confession despite a trial court's ruling that the confession was voluntary and admissible as evidence. *People v. Gilliam*, 172 Ill. 2d 484, 512-13 (1996). However, this right of defendant does not diminish the general rule that the admission of evidence is within the sound discretion of the trial court, and its ruling will not be reversed absent abuse of that discretion. *Gilliam*, 172 Ill. 2d at 513. The decision as to whether an expert witness offers relevant testimony is also within the sound discretion of the trial court. *In re Commitment of Simons*, 213 Ill. 2d 523, 530-31 (2004).

Defendant offered the following proffer as to the content of Corcoran's proposed testimony[2]:

> "Dr. Corcoran would testify, in accordance with the report tendered [regarding Corcoran's evaluation of defendant's fitness for trial] that the Defendant has been diagnosed with Narcissistic Personality Disorder and that individuals with this particular disorder are prone to creating fantastical stories about themselves, both in the manner of complete fabrications and inserting themselves into the reality around them which they are not otherwise a part of."

The court stated that it "assume[d] that [Corcoran's] opinions and any discussion he would give would be based on what [defendant] told him" and thus that "the State [would be] barred from being effectively able to cross examine [Corcoran] if he were to testify." The trial court noted that Corcoran's report was dated January, 30, 2003 and defendant's confession occurred in March 2002, and it concluded that "obviously Dr. Corcoran was not a time concurrent witness to any of the statements." We agree with the trial court.

Defendant argues that the trial court erred in excluding Corcoran's proffered testimony as not time-concurrent, because expert testimony, unlike lay person testimony, need not be time-concurrent in order to be relevant. However, while defendant's proffer of evidence does

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[2] Defendant's proffer was part of his motion to reconsider the trial court's ruling barring Corcoran's testimony. The trial court summarily denied defendant's motion to reconsider. Therefore, though we refer to defendant's motion to reconsider for the content of Corcoran's proposed testimony, we refer to the trial court's original ruling barring Corcoran's testimony for its rationale in denying the motion to reconsider.

indicate that Corcoran would testify as to the nature of Narcissistic Personality Disorder, it does not give any indication that defendant was diagnosed with that disorder at the time he confessed to the arson. Even if Corcoran diagnosed defendant with the disorder himself, and did not simply repeat a diagnosis from defendant or another doctor – a proposition that is anything but clear from defendant's proffer and Corcoran's fitness report – Corcoran could not have made such a diagnosis until he examined defendant in preparation for trial, almost one year after defendant's arson confession. As such, his testimony would not have been relevant. See *People v. Dunigan*, 96 Ill. App. 3d 799, 820-21 (1981) (person who would testify to the defendant's insanity 10 months after his crime did not offer relevant testimony concerning his state of mind at the time of his crime), citing *People v. Davidson,* 82 Ill. App. 2d 245, 249 (1967) (doctor who examined the defendant four months after his crime could not offer relevant evidence of the defendant's state of mind on the day of his crime).

Defendant notes that he himself testified that he was diagnosed with Narcissistic Personality Disorder. However, we do not believe his testimony laid a proper foundation for Corcoran's proffered testimony, because, though he testified that his tendency to exaggerate was called Narcissistic Personality Disorder, he never testified when he was diagnosed with this disorder, and there was no other testimony offered from a doctor who had diagnosed him with the disorder as of the time of his confession. Because defendant offered nothing to establish the relevance of Corcoran's proposed testimony, we hold that the trial court did not abuse its discretion in excluding it.

Defendants fourth argument on appeal of has arson conviction is that the trial court erred in allowing the State to present to the jury passages from defendant's journal. Defendant first argues that the journal entries bore no relevance to the crime charged. See *People v. Goldsberry*, 259 Ill. App. 3d 11, 17 (1994). However, as defendant notes, evidence is related to the crime charged even where it "establishe[s] in some slight degree the existence of the motive relied upon or alleged." *Goldsberry*, 259 Ill. App. 3d at 17, citing *People v. Smith*, 141 Ill. 2d 40, 56 (1990). Certainly defendant's statement that he felt anger and was seeking some destructive way to act upon it establishes, at least in some slight degree, a motive for his burning of the church. Thus, the evidence was relevant.

Defendant also argues that the journal entries were unduly prejudicial. See *People v. Smith*, 141 Ill. 2d at 57-58. However, our review of the record indicates that the trial court expressly considered the relevance and potential prejudice of the journal entries, and it appropriately limited which journal entries could be offered into evidence by requiring that the proffered entries be within six months of the date of the arson. We find no error in the trial court's ruling on this point.

Defendant's final argument on appeal of his arson conviction is that, by allowing the State to introduce the videotaped confession despite the fact that the earlier parts of defendant's interview were not taped, the trial court violated the completeness doctrine. We find defendant's argument on this point to be without merit. The completeness doctrine allows the opposing side to provide context when only a portion of a conversation is offered into evidence. See *People v. Caffey*, 205 Ill. 2d 52, 90-91 (2001). Here, police left defendant alone for 20 minutes

before re-entering the room and starting the videotaped confession. Thus, the videotaped confession began an entirely new conversation between defendant and the police, and defendant was fully aware that only the recorded portion of his interview would be memorialized. The recorded conversation was related in full to the jury. The purpose of the completeness doctrine is to put a statement offered to the jury in its proper context so that the correct and true meaning of the statement is conveyed to the jury. *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 556 (1976). Here, defendant's videotaped confession was not taken out of its context, and his confession's true meaning was conveyed to the jury.

Nor do we find any merit in defendant's contention that his due process rights were violated by the State's failure to preserve video evidence of the interview that took place before defendant's videotaped confession. Defendant cites *People v. Pecoraro,* 175 Ill. 2d 294 (1997), for the proposition that due process may be violated where police, in bad faith, fail to preserve potentially material exculpatory evidence. However, defendant can make no showing of bad faith in the State's failure to videotape the entire interview, and his final argument fails.

For the foregoing reasons, we affirm defendant's conviction in the arson case.

The Solicitation for Murder Case: No. 2-04-0084

While defendant awaited trial for the arson case, he was charged with solicitation of first degree murder for attempts he made to hire someone to kill Mottier before Mottier could testify in the arson trial.

The State presented the testimony of two inmates who both claimed that defendant approached them with his desire to have Mottier killed. Ray Garvin, another of defendant's fellow inmates, overheard defendant's requests and informed his lawyer that he was willing to cooperate with law enforcement personnel as they investigated defendant's solicitation attempts. Garvin subsequently wore a recording device in his shirt pocket and acted as a relay between defendant and "Tony," an undercover police officer posing as a hit man. Several recorded conversations between Garvin and defendant were admitted into evidence. In those conversations, which we transcribe below, Garvin and defendant discuss how defendant will procure Tony's services. The State also admitted into evidence a recording of a conversation between Kristie Karels and defendant. Karels began a relationship with defendant after reading about him in the paper, and he asked her to lend him money for the initial down payment he needed to procure Tony's services. Karels was not aware until after the investigation concluded that her conversation with defendant was recorded.

After Karels refused to give defendant the money he requested, the State enlisted the assistance of Jennifer Williams, defendant's former girlfriend, who visited defendant in jail and also spoke with him on the phone, during the same period of time in which he was seeing Karels and also after Karels and defendant ended their relationship. The State admitted into evidence recordings of their conversations regarding defendant's plan. During these conversations, Williams agreed to give defendant the money he needed to hire Tony, and defendant directed Williams to the location where she was to deliver the money to Tony.

The crux of the State's case was a series of recorded conversations between defendant and Garvin, Karels, and Williams. The first of these conversations took place on July 18, 2002, at 3:29 p.m.:

> Garvin: "What you want * * * . What you want him beat up, you want him threatened?"
>
> Defendant: "Personally, I'd like his throat slit. I don't know. Maybe a couple bones broken."
>
> * * *
>
> Defendant: "Someone needs to tie a Columbian necktie around his fuckin' neck."
>
> Garvin: "So would you want me to try and get in touch with [Garvin's hit man friend] and [inaudible] money?"
>
> Defendant: "Lemme talk to my girl. How much you think it would take?"
>
> Garvin: "[Guesses about how much]."

Later that day, at 3:40 p.m., defendant and Garvin continued their conversation:

> Garvin: "So you askin' to do Tom, huh?"
>
> Defendant: "Yeah."
>
> * * *
>
> Garvin: "Call your girl, and tell her [inaudible] I guess if you ain't got no witnesses . . . "

Defendant then referred to Mottier's possible testimony, which, as discussed in our disposition of the arson case, would include defendant's admissions to Mottier that he burned the church and the fact that Mottier allowed police to record a phone conversation between him and

defendant in which defendant described how he burned down the church. Defendant also speculated as to how much money Karels might be able to lend him so that he could go forward with his plan. The two continued:

> Garvin: "So you don't want him beat up – you want him outta there?"
>
> Defendant: "Yeah. * * * Get a message to him without it being blatantly obvious that it was me."

At 3:49 p.m. on July 18, Garvin and defendant further discussed defendant's desire to have Mottier killed:

> Garvin: "How long you been knowin' [Mottier]?"
>
> Defendant: "Seven years [inaudible]."
>
> Garvin: "You sure you wanna have him killed, huh?"
>
> Defendant: "Yeah. I forgive him, but at the same time I can't [inaudible] has allowed me to, like, be cold about it. * * * He fuckin' tricked on me like that, dude. There's no excuse for that. You play with my life, I'll play with [inaudible]."
>
> Garvin: "All right, I'm gonna call tonight.
>
> Defendant: "Yeah."
>
> Garvin: "You call your girl –
>
> Defendant: "Yeah."
>
> Garvin: "You let me know * * * ."

After some speculation from defendant as to whether he might be able to trick his parents into giving him the

money he needed to order Mottier's killing, Garvin and defendant continued:

> Garvin: "You going to be able to act remorse when you see him on the news dead?"
>
> Defendant: "I will be so happy. It will be such a relief."

Later that day, at 4:07 p.m., the two continued:

> Garvin: "You sure you wanna do this?"
>
> Defendant: "Yeah. I have no other choice."
>
> Garvin: "All right, well see. We'll see."

* * *

> Defendant: "I'm feeling this kind of sense of, like, God doesn't want me to do this, but, at the same time, [inaudible], I saved his life once, [inaudible], he fucked me, so I can take his life back."

The next day, at 8:12 p.m. Garvin approached defendant to relay a message from Tony:

> Garvin: "I called my boy. I'm gonna call him back at 8:30."
>
> Defendant: "All right."
>
> Garvin: "He wants – talkin' about goin' out there tomorrow to cheek the joint out."
>
> Defendant: "All right."

* * *

> Garvin: "So you gotta decide how we gonna give him the money –

Defendant: "All right."

Garvin: "And then work out the rest of it."

* * *

Defendant: "Hey, man, I'll talk to my girl about the money tonight, and if I can, like I gotta find out where she stands. If she can't get the money, then I'll call it all off right away, because I don't wanna fuck you around, you know."

* * *

Garvin: "OK, so, if your girl won't give you the money – "

Defendant: "Right."

Garvin: "[inaudible]."

Defendant: "Yeah, I think I can get it from her. * * * Shouldn't be a problem at all."

Garvin: "All right."

Defendant: "Yeah."

Garvin: "I'm gonna call him at 8:30."

Defendant: "Yeah."

At 8:38 p.m. Garvin approached defendant to tell him that he had spoken with Tony:

Garvin: "He said, 'You sure you want him dead?' "

Defendant: "Yeah. Throat slit."

Garvin: "Throat slit. Throat slit. He said, if you can't get the money from your girl – "

Defendant: "Mm-hmm."

Garvin: "We gonna have to work out something. But you gotta have some type of money."

Defendant: "Yeah, yeah. I'll get somethin'. I'll get somethin'. I'll get it from my girl, hopefully."

Garvin: "Now you ain't bullshittin' me?"

Defendant: "No, dude."

Later that night, at 10:20 p.m., Garvin confirmed with defendant that he was still interested in hiring Tony to kill Mottier.

Garvin: "Still on, huh?"

Defendant: "Yeah, its still on. She says she [inaudible] what she can do about the cash, but we didn't really talk too much about it, because, you know, she is having problems with my kid – with our kid. * * * ."[3]

Garvin: "Who is this? The girl that you met in the newspaper?"

Defendant: "Yeah."

On July 31, at 6:35 p.m., Garvin relayed another message from Tony to defendant:

Garvin: "I talked to my boy. * * * He wanna know if you [inaudible] get the 500 [dollars] by Friday, Saturday, or [inaudible]."

Defendant: "She's got close to 350 now.

* * *

[3] The record does not establish whether defendant is the biological father of Karels's child.

Defendant: "Could he just [inaudible] the 350, or what? [Inaudible] gotta be five [hundred dollars]?"

Garvin: "I don't know. I'm gonna call back him later on."

Defendant: "All right."

At 6:51 p.m., Garvin told defendant he had spoken with Tony regarding the terms of payment:

Garvin: "Hey. I just talked to him."

Defendant: "Oh, you did?"

Garvin: "He say, uh, he'd take the 300 [inaudible]. [Inaudible] tell you how he gonna get the money, and how he gonna get the rest."

Defendant: "All right."

* * *

Defendant: "How long does he want [inaudible]?"

Garvin: "How long will it take?"

Defendant: "I don't know. I gotta call my girl back at eight. Can you call at 8:30?"

* * *

Garvin: "Yeah, I call him back when you get off the phone."

Defendant: "All right. Cool. Cool. Yeah, I'll find out. If it'll take a while [to get the money], probably just be better off to save up more and then get the thing started later, right?"

Defendant and Garvin then discussed whether defendant should make a larger down payment in order to avoid owing Tony more money later and whether defendant should wait to hire Tony until after he could accumulate more money for a larger down payment. The following exchange then took place:

> Defendant: "See, I got nothin' but time now, 'cause we ain't even gonna be hittin' trial 'til after November, that's what I found out from my attorney. So, as long as homeboy's taken care of before, or around November, you know."
>
> Garvin: "OK, so I'm going to call him back later on, after you talk to your girl."
>
> Defendant: "All right."

Later that night, at 7:37 p.m., defendant gave Garvin Mottier's home and work addresses and they farther discussed whether defendant would be able to get the money from Karels:

> Garvin: "What is this, read this to me."
>
> Defendant: "[Reading Mottier's home and work address to Garvin]."
>
> Garvin: " * * * Now you gotta figure out [inaudible] whoever to meet my boy – "
>
> Defendant: "Mm-hmm."
>
> Garvin: " – and give him the money."
>
> Defendant: "[Inaudible] money."

* * *

Defendant: "Right, but, like I said, like I said, it doesn't have to be done 'til November, really."

Garvin: "He wanna go and get it done. Over with."

Defendant: "Oh, right now?"

* * *

Defendant: "Lemme talk to my girl and see whether she can get 500."

* * *

Garvin: "What you gonna tell her?"

Defendant: "She already wants to kick [Mottier's] ass. Maybe I can talk her into – I don't know. I'll talk to her. * * * That could jeopardize the whole thing [inaudible]. 'Cause then she's gonna know why she's saving up the money."

Garvin: "Well maybe – "

Defendant: "What do you think I should do?"

Garvin: " – just [inaudible]. What she don't know, she don't know. You just tell her to drop off the money."

Defendant: "She's gonna ask me, 'Why?' "

Garvin: "See you gotta make up whatever you gonna do for that."

Defendant: "Hmm. I'll think about it. I'll think about what I gotta tell her."

Garvin: " * * * Do it by 8 o'clock."

Defendant: "Yeah."

At 9:00 p.m. that night, defendant reported back to Garvin regarding his conversation with Karels:

> Defendant: "I didn't really get to talk to her much, because fuckin' [her child], who's like, givin' her hell and shit, and I had to talk to him, but she said, um, she's gonna have the $350 by Friday. Um, I was like, 'Well, you know, can I talk to you tomorrow about making arrangements to drop it off and stuff?' And she's like 'Why do you need it?' and I was like, 'It's just about my case.' And she's like, 'Well, all right.' And I'm like, 'Well, you know, just see if you can get more, too.' She's like, 'All right, I'll see,' you know, 'I'll see what I can do.' She's gonna talk to her brother. She just borrowed $100 from her brother, but she paid him back last night, so she might be able to borrow, like, another 200 bucks from her brother. So she's gonna try and – she's gonna talk to her brother tomorrow when she's at work and see if she'll – he'll lend her, like, 200 bucks."

At 9:07 p.m., Garvin confirmed that defendant would continue to try to get the money from Karels, and he relayed messages from defendant to Tony, the police officer posing as a hit man, who was on the phone with Garvin during the conversation:

> Garvin: "You gonna call her back tomorrow, right?"
>
> Defendant: "I'm gonna call her tomorrow, see if she can get the $500, and I'll call her and

let her know that she's gonna meet somebody named Tony at, like, McDonald's or something."

Garvin: "OK, you want, you want him to do it tomorrow or Friday? You want him to do it Friday or tomorrow?"

* * *

Defendant: "Friday. Yeah. Do it Friday."

Garvin: "Friday."

* * *

Garvin: "You ain't bullshitting, right?"

Defendnat [sic]: "No."

* * *

Garvin: "Are you bullshittin'?"

Defendant: "No. No, I'm not."

Garvin: [Talking to police officer posing as Tony the hit man]. "He's not." [Pause while Garvin listens to man on phone]. "[Tony] said, when you get out, its gonna be [inaudible] gonna be 700 to $1,000. How much you gonna [inaudible] give him when you get out?"

Defendant: "When I get out?"

Garvin: "Right."

Defendant: "Um, shit, I don't know. It'll be a while before I get out. She if she could – she could pay him back in, like, installments and shit? 'Cause I can give him like 3 or 4 hundred when I get out. And she could pay back, like, another 3 or 4 hundred in, like, a couple months."

[They relay defendant's statements to Tony].

* * *

Garvin: "OK, when you want [inaudible] done?"

Defendant: "Doesn't matter to me. Just before November. * * * Shit, do him on his birthday."

* * *

Garvin: "He say the money gotta be in his hand by [inaudible], though."

Defendant: "All right. The 350?"

Garvin: "Right."

* * *

Garvin: "He say, when you get the money set up, I'll tell you, and you call your girl and tell him where to meet her at."

Defendant: "All right."

* * *

Garvin: " * * * What's the girl's name?"

Defendant: "Kristie. Kristie Karels."

* * *

Garvin: "Does she know what's up?"

Defendant: "No."

Garvin: [relaying to Tony] "No."

Defendant: "She just knows she's helping my case."

The three then set up where and when the meeting to deliver the money was to take place.

On August 1, defendant attempted to convince Karels to lend him the money he needed to carry out his plan. Neither party was aware that police were recording their conversation.

> Defendant: "Question for you. I don't know how to phrase this. I know what your answer's gonna be. But, figured I'll ask you anyway, because I have to now think of a way, because I got myself into this situation [inaudible] say I'm gonna do one thing to one person and then I'm, like, not really meaning it, but it's, like, a good idea. But at least in my mind I realize it's really a bad idea, and I have to think of a way to get out of it. And so, you know, I don't know. * * * But its come to the point now where this guy's like, well, whatever, and [inaudible]. So, uh, I don't really know how to ask you to do this. Um, we agree that [Mottier's] a problem, right?"
>
> Karels: "Yeah."
>
> Defendant: "Well, what if, uh, I said there was a way that we could fix that problem?"
>
> Karels: "[Inaudible]."
>
> Defendant: "I'm not, like, directly talking about it. I'm just saying, you know – "
>
> Karels: "[Inaudable [sic]]."
>
> Defendant: "Yeah, I could solve a problem, like, indirectly solve a problem."
>
> Karels: "[Inaudible]."
>
> Defendant: "And what?"
>
> Karels: "[Inaudible]."

Defendant: "Well, see, I – um, there has to be, like, a down payment made, and then, like, it would get taken care of. And then, like, the problem solver would be, like, reimbursed later."

Karels: "[Inaudible]."

Defendant: "I don't think – I couldn't say it any more clearly. There's like a problem solver. The Channel 2 News problem solver, only he's not with Channel 2 News. But let's just say he is for right now. And you would, like, meet this problem solver, right? You would, like, drop off, like, a down payment to get the Channel 2 News crew over to, like, the problem's house, and, like, take care of the problem. They like, interview the problem, ya know? And, uh, they take care of it, and then I, uh, you know, when I got out, I'd, uh, pay Channel 2 News back for the, you know, favor they did."

Karels: [Inaudible]."

Defendant: "What's that?"

Karels: "How do you expect [inaudible] down payment?"

Defendant: See, I, that's, that's where I knew it's completely ridiculous."

Karels: "[Inaudible]."

Defendant: "$350."

Karels: "What?"

Defendant: "350."

Karels: "[Inaudible]."

Defendant: "Um, see there's this person I'm in here with that I've known, like, almost since the beginning, like I've gotten here, and he, when I was originally down in the hole the first time, you know, we had, like, kinda did stuff through the wall, but not blatantly, but we did, like, discuss it through the wall, * * * and I tried to give him some information, but it got to the wrong person. So, then, like, you know, by coincidence or something, when I went back up from the hole the second time, he was put into the pod that I was in, and then we were both moved into this pod. So it's kinda been something, like, we've been discussing things, like, 'Are you serious? Are you sure you wanna do this? Blah blah blah.' And he's like, 'I can do it if you want me to, 'cause all, you know, I just have to call Channel 2 News and Channel 2 News will take care of it.'"

Karels: "How do you know that that person is [inaudible]?"

Defendant: "Um, because he's done some illegal things in here."

Karels: "[Inaudible]."

Defendant: "Because this way it's out of both of our hands."

Karels: "[Inaudible]."

Defendant: "Well – "

Karels: "[inaudible] that other kid, and I'm involved – "

Defendant: "Well, he's not a kid."

Karels: "[Inaudible] thing all unravels. [Inaudible] he's gonna get caught, you're gonna get caught, and I'm gonna get caught."

Defendant: "Well – "

Karels: "Then we're all gonna be in jail together. [Inaudible]."

Defendant: "See, like, here's the thing, though. I mean, it'd be tough for them to catch you, because [inaudible] be looking for him. Know what I'm saying?"

Karels: "[Inaudible]."

Defendant: "Tony."

Karels: "Channel 2?"

Defendant: "Tony the Tiger. Yeah Channel 2."

Karels: "I don't understand [inaudible]."

Defendant: "Because that's too direct."

Karels: "[Inaudible], I can wear a wig [inaudible]."

Defendant: "You can't change your profile. If somebody from a completely different world came up to him and took care of the problem, permanently, there wouldn't be any link."

Karels: "[Inaudible]."

Defendant: "Take care of the problem permanently."

Karels: "[Inaudible]."

Defendant: "I don't like to use that word."

Karels: "[Inaudible]."

Defendant: "No we gotta [inaudible]. We're on the phone here. He would take care of the problem permanently. [Mottier] wouldn't be able to show up for any kind of testimony."

Karels: "[Inaudible]."

Defendant: "But see, this way though this way though, there's too many channels to go through for [inaudible]."

Karels: "You're willing to risk [inaudible]."

Defendant: "[Inaudible] future. It's like – "

Karels: "You're willing to risk [inaudible]."

Defendant: "It's, it's, it could be, like, a temptation from Satan, see that's what I'm saying. It could be, like, a temptation from Satan, but it's, like, more than a coincidence that I've been put with this guy, like, a few times."

Defendant: "Hold on I've got to go, uh, get my medication real quick. I'll be right back."

* * *

Defendant: "All right. I'm back. Now let's talk over the plan, quick. [Inaudible]."

Karels: "[Inaudible]."

Defendant: "Well, like, it's like I said, that's why I, um, you know, I was just, you know, thinking about backing out. Well, I just, what I was going to do was back out of the whole thing, but I thought I'd run it by you. [Inaudible]. But at least let me tell you how it would sort of go down, just, you know, to give you an idea so you can

have all the information to make a decision. And help me come up with an excuse [inaudible]. Um, basically, uh, you would, uh, [inaudible], and, uh, with the down payment, you would, uh, you know, [inaudible] pager number, I could relay it to Tony the Tiger personally, and, uh, the person from Channel 2 News. He would page you, and afterwards you would meet up somewhere, um, probably somewhere in Addison. Like, during around like 4 to 5 when it's kinda like busy and, like, rush hour somewhere, like, you know, a McDonald's or somewhere, you know like, low-key, lots of people, nobody really notices anything. And that's where you would transfer the money. And [inaudible]. All he's concerned about is the down payment, and then um, I would be given a number so I could be contacted after the job has been taken care of and, um, you know, let him know what the payment, you know, the rest of the process and stuff. But basically, you know, that's all, as far as you would be involved. If he gets rolled over, whatever, he would have to roll over on another person in here, and then he would roll over on me, and you know I would never give you up, so you're fine, you're clear, scot-free. If I didn't say anything, there's no way they could ever stick it to me. I'd keep my mouth shut, my [inaudible]."

Karels: "[Inaudible]."

Defendant: "I know exactly how. But I can't give you specifics."

Karels: "Why?"

Defendant: "It would be at work. It would be, let's just say, have you ever heard of, like, a Columbian necktie?"

Karels: "What?"

Defendant: "Columbian necktie? Where your throat is slit from here to here and your tongue is pulled through the slit in your throat. He'd be receiving, like, a present similar to that."

Karels: "[Inaudible]."

Defendant: "What's that?"

Karels: "[Inaudible]."

Defendant: "No. It'd look like a robbery or something."

* * *

Defendant: "[Inaudible]. I'm in jail. How could I plan anything from in here? I don't know anybody with those kind of connections. I know how to pass lie detector tests, too."

* * *

Karels: "How do you know [inaudible]?"

Defendant: "That's a [inaudible] good question. That's a good question."

Karels: "And then what if I never see this guy again? [Inaudible]. Then I'm out $350 I really don't have."

Defendant: "Yeah, I know. But then I would pay you back when I got out of here and we wouldn't have anything to worry about. [Inaudible] on me getting out of here. [Inaudible] leap of faith. I don't know."

Karels: "[Inaudible]."

Defendant: "*[Inaudible] just have to take a* chance [inaudible]."

Karels: "[Inaudible] know who I am."

Defendant: "Awe but, you see that – [inaudible] – if you go to talk to him about me, then obviously you're connected to me in some way, shape, or form. Now, if the court realizes that someone connected to me went over to talk to him and maybe used physical threats, that's gonna violate my, you know, they're gonna raise my, uh, my bond. And they're probably going to hook me up on some sort of racketeering or conspiracy charge. Not racketeering [inaudible] conspiracy charge. That's why I don't want you going over there. Because you have to know the long arm of the law [inaudible] Du Page. If somebody not from this county that's not connected to me in any way, shape or form, they can't identify, you know, you or I from Adam, [inaudible] expression. That's what you call 'clean.'"

Karels: "[Inaudible]."

Defendant: "No, its not going to make him disappear, but it will, it will solve, I mean, the case, basically. That gets thrown out, the video confession gets thrown out, then there's no witnesses, what's the State to do? I don't know. Like I said – "

Karels: "[Inaudible]."

Defendant: "I brought [Mottier's] life back from [inaudible]. I kept it a secret. I saved his ass. That kinda puts me in a position to take it back. 'Cause if I would have never saved him, he wouldn't be alive to throw me in here."

Karels: "I have to think about it."

Defendant: "All right. That's a different reaction than I expected, but, OK."

Karels: "Why, [inaudible]."

Defendant: "I didn't even think you would consider it. I was thinking you would say I'm crazy and 'Hell no.' "

* * *

Defendant: "It would genuinely hurt me, you know, I'm probably going to be very emotional as I recall the seven years I spent with him. But then I'm gonna know that my problem is solved."

* * *

Defendant: "I don't know, you know. I could just sit here for another four months and see what happens."

Karels: "All right, do you really want to do this?"

Defendant: "Yeah, it's a possibility."

Karels: "OK. I think you should take from now until your next court date and think. And really think about it."

Defendant: "But man, I did think about it. The guy wants – the Channel 2 News crew, though, they wanna get it over with. They don't want to wait. 'Cause that's what I suggested to this person. This person said – Tony the Tiger would rather get it over with now."

Karels: "[Inaudible]. I don't have $350 right now."

Defendant: "I know. I know. [Inaudible] hold it up for [inaudible]."

Karels: "And you told this guy that's in there with you that you would talk to me about this?"

Defendant: "No. See, I told him that I was going to talk to you about getting the money. But then I knew that there was no way in hell I was going to be like, 'Yeah, could I get $350, could you go meet this guy, Tony, at this place in Addison, and give it to him?' You'd be like, 'What the fuck for?' you know. 'This is my money.' And start asking questions like any rational person would. So I was like, it would be a hell of a lot better, since our relationship is based on honesty, it would be easier for me to be honest and tell you up-front what this is about."

Karels: "Well, I'm not giving any money to anybody until I know [inaudible]. I'm not giving you money [inaudible]. That's a lot of money.

Defendant: "Yeah OK."

Karels: " – that I don't have."

Defendant: "All right, that's, you know, that's a reasonable comment and reaction.

[Inaudible] give me time to think it through and, you know, [inaudible] I guess."

Karels thereafter refused to give defendant the money he requested. At that time, Williams initiated contact with defendant. On August 13, at 4:59 p.m., defendant told

Garvin he did not intend to go through with the plot to have Mottier killed:

> Garvin: "I talked to my boy, man. He kinda mad, man."
>
> Defendant: "Is he? Well, I don't think we're gonna [inaudible]."
>
> Garvin: "So what you [inaudible]?"
>
> Defendant: "No. No I – I don't know what the hell I'm gonna do with [Williams], but, right now, with [Karels], dude, we've got a lot of problems to work out, and she said she doesn't even wanna pay for all that shit, that's just one more thing she'd have to deal with, and she doesn't want to see me go to jail. She's worried about getting caught up herself. I don't know. I kind of, you know, I just don't want to make another bad decision, you know what I'm saying. I've been making bad decision all my life. It needs to end somewhere. I guess I'll just have to [inaudible]. That's gonna be my answer for now. I can't make any more decisions based out of anger, or based out of fear, or something like that, you know. 'Cause that's how it's been all my life. You know? I'm serious, man. That's how I make – I make my decisions out of anger and fear all the time – "
>
> Garvin: "So how you gonna make up for them three people [defendant told Garvin he] killed?"
>
> Defendant: "I'm not, man. There's no way I'm ever gonna be able to do it. It was two people. There's no way I'm ever gonna be able to do it. Just have to see. If God judges me, then he judges me. I go to hell, I can try and spend the rest of my life, you know, following in the

footsteps of Christ and try to make up for that, but I don't know if God will ever forgive me."

Garvin: "Yeah, I guess you. [inaudible] you, uh, try to do the right thing."

Defendant: "This wouldn't be a way to do that, you know. Even if its not -directly – the blood is not directly on my hands, I'm still ordering that to be done, you know. Still my decision to have him removed, you know. Maybe things will weigh out, maybe he'll get his eventually, but I saved his life, and I'm going to make up for [inaudible]. So maybe God will have some special judgment on me because my life is in danger and, I don't know. But the only thing I can do is try and live my life [inaudible]. [Inaudible] Just gonna try and avoid confrontation and just get the fuck outta here. And when I get out, just do my own thing, you know. Just work and grow."

Garvin: "Yeah, well that's a good thing."

Defendant: "Just try to make money and follow in the footsteps of God. Go to church, help my community, use the money I make fuckin' growing [inaudible] community."

On August 13, at 5:42 p.m. defendant told Garvin that he was expecting a visitor the next day, and the two discussed defendant's theory as to how Williams's father arranged matters so that defendant could receive more visits than are normally allowed, Defendant then explained to Garvin that he did not plan to ask Williams for the money to have Mottier killed but that he hoped Williams would take matters into her own hands:

Garvin: "So * * * was she comin' out here and sayin' that, start talking about what you said about wantin' to get somebody to do somethin'?"

Defendant: "Oh, yeah. Yeah yeah."

Garvin: "You just gonna say, 'Fuck it.' huh? * * * When [Williams] come out here [tomorrow] and start talking about doin', gettin' [Mottier]."

Defendant: "Yeah, I'm just gonna say, 'You know what, I don't want to have anything to do with it. I'm not gonna tell you to do it,' and whatever. And like, 'You decide to go ahead and do that, that's not on me, you know.' I'm like, 'That's you.' That's what I'm gonna tell her. I can't say that I don't want it done, but I just don't want to be the one ordering him to be killed, you know. To be the one responsible for it. If she decides to take it into her own hands and get rid of him [inaudible], that's on her."

* * *

Garvin: "What you think?"

Defendant: "She will [take it into her own hands]. [Laughing]. 'Cause she's already pissed at him. She came in, she was like, 'Tom [inaudible].' And then I told her that he was [inaudible]. [Inaudible] like, 'mother fucker, I'll fuckin' kill his ass.' And all [inaudible]. And I'm like, 'Well, don't think I hadn't thought of it.' She's like '[Inaudible] going to get my [inaudible].' She's like, 'Don't worry, yo.' [Inaudible].

* * *

The next day, on August 14, Williams visited defendant:

Defendant: "I was hopin' you'd come today." Williams "I told you I would."

* * *

Williams: "You been talkin' to that girl [Karels]?"

Defendant: "We [inaudible] broke up."

Williams: "[Inaudible]."

Defendant: "Yeah."

* * *

Defendant: "[After Williams had asked if he kept up with their old friends]. And [Mottier], Fuck [Mottier]."

Williams: "What – "

Defendant: "You know – "

Williams: "I know you don't like [Mottier], but – "

Defendant: "[Mottier]'s a little bitch."

Williams: "What'd he do?"

Defendant: "What did he do?"

Williams: "Well, I mean you told me last time, but, like –

Defendant: "I [inaudible]."

Williams: " – [inaudible] really good friends."

Defendant: "I fucking saved his life after he O.D.'d on blows."

Williams: "Yeah, [inaudible]."

* * *

Defendant: "But he O.D.'d, though, baby.

Williams: "He O.D.'d?"

Defendant: "He O.D.'d, His lips turned blue and he was fuckin' white and shit. His eyes rolled back in his head. You remember Brad?"

Williams: "Yeah."

Defendant: "We were, like, at Brad's friends place. We had to get, like, fuckin' adrenaline shot. Shot him through the heart. Like right out of Pulp Fiction Like five – you know, well, it was like maybe a minute later or whatever. Thirty sec – it seemed like forever. He was just, like, chillin' there. You see, like, him sorta start twitchin', and then his eyes just open, and he was like, 'Oh, fuck.' And his nose started bleedin' and shit."

* * *

Defendant: "So I saved his life."

Williams: "And so now you're not friends with him any more?"

Defendant: "No. Man, he tricked – well, I – All right. I went to go pick up a handle of rum for him, like, on a Mon – like, All right. This shit supposedly happened, like on Monday morning. Like, you know, 2 or 3 in the morning or whatever."

Williams: "Hm-hmm."

Defendant: "And, uh, I went to go, you know, that night, we were gonna to go see a movie. Like me, my friend Meg, and him were all gonna go see, uh, "It's All About the Benjamin." * * * Well, he didn't wanna go. 'Cause his tooth, his wisdom tooth was supposedly hurt. * * * So I bought him a handle. * * * On the way back, we drove past the church both times. And he was like, 'Aw, you know, that's crazy about the church,' and blah, blah, blah, because I had told him about it, what I read in the paper. Like, 'Yeah, it was an electrical fire and shit.' He's like, 'No, I started the church on fire.' I'm like, 'Bullshit, man. I started the church on fire.' And, like, he's like, 'Oh yeah?' He's like, 'How did you do it? And I'm like, 'I went in there,' you know, and I told him this bullshit story about how, like I went and drank a lot of wine and, like, threw some matches in a garbage can or whatever. And then he calls me like two days later. He's like,' 'Oh, hey, what you doin'?' I'm like, 'Hey, I haven't talked to you. We need to get together. You got any of that handle left?' Boo, boo, boo. And, uh, you know, and then he starts asking questions about what I told him. I'm like, * * * 'This is kinda weird, why does he wanna know?' But I didn't even think Tom would be fuckin' trickin' with the police on the other line. They ran a wiretap on my shit. And so he got me to make up this whole big story. He's like, 'Dude, I can't believe you did that. Are you serious?' I'm like, 'No. Why would I make something like this up?' You know, I was being totally sarcastic and shit. But the cops arrested me the fuckin' next day, and they said that he was a witness and that was their probable cause. But I didn't know, and they

didn't even tell me that shit. So they fuckin' had me in a holding cell * * * for, like eight hours that day. And they were just fuckin' – I would hear Meg in the next room, and they'd be questioning her and shit. And I was like, 'I'm hearin' voices.' I thought I was gain' crazy and shit. And you know I ended up fuckin' confessing even after I, uh, I asked for an attorney, like, twice."

Williams: "Yeah, I remember you telling me that."

Defendant: "Yeah. I asked for an attorney and they violated my rights. And they're like, 'Well, we have – your fingerprints were on the bottle of wine or whatever. They took that from the story. [Inaudible]. I was like, 'But, there's only one person that knows.' * * * I was all confused and shit, 'cause it was hot. And then I was just like, 'Oh, fuck,' you know. I'm like, 'I wanna talk to my attorney.' * * * I start answering all these questions, 'cause they're like, 'if you don't cooperate, you're going to jail for, like, 30 years. But if you do cooperate, you'll get off with probation,' and all this bullshit. That's what they promised me. * * * So I confessed, like, verbally, and then they're like, 'Well, we need you to sign something or put this on videotape or something like that.' I'm like, 'I ain't gonna do any of that unless I have an attorney present.' So that's when they left and acted like they called him, but when they came back, they rolled the video and taped that shit. In the beginning, I was like, 'Where's my attorney, is he coming?' and shit. And they're like, 'Oh yeah, he'll be here any minute.' So that was on the fuckin' first part of the tape. [As noted in our discussion of the arson case, defendant actually made no request to see

an attorney during his videotaped confession]. They never called [inaudible]."

* * *

Williams: "So what are you going to do to [Mottier] when you get out [inaudible]?"

Defendant: "I don't know. Like, I really wanna fuckin' kill him."

* * *

Defendant: "I really wanna kill him and shit. You know. I told you, I was gonna pay $350 –

Williams: "I can't hear you."

Defendant: "I was gonna pay – I was gonna pay $350 as a down payment. To get someone [inaudible] to take care of him. Like slit his throat."

Williams: "Are you still gonna do it?"

Defendant: "No, because, I don't want that shit tied to me, you know. * * * Besides, this girl, [Karels], she was gonna do – she was going to pay them for me."

Williams: "Is there anything I can do to help, because you know I'm here for you."

Defendant: "Oh, I know. You still run with the GD's [street gang]?"

The two discussed Williams's gang affiliation and then continued the conversation:

Williams: "If you need any help or anything like that . . . "

Defendant: "I don't know. I just want the problem [inaudible]."

Williams: "Well, what do you want me to do?"

Defendant: "I don't know. I'll leave it [inaudible] your hands."

Williams: "Well, you gotta [inaudible]. What do you want done to [Mottier]? You want him [inaudible], don't you?"

Defendant: "Yeah, I do. I don't want him to be able to testify or say anything."

Williams: "So you were going to have that girl who saw you in the newspaper [Karels] go pay someone off or something?"

Defendant: "Yeah. This dude – this dude in here, he * * * was in, like a theft ring where he was stealing jewelry and shit –

Williams: "Mm-hmm."

Defendant: "But he fuckin' pawned it off to [members of the] Bloods [street gang]. * * * So he knows this dude he was gonna fuck – you know, that was gonna do it. * * * Down payment 350 and then I was just gonna pay him back when I got on the outside."

On August 15, at 12:07 p.m., defendant and Williams spoke again. After some introductory conversation, the following colloquy took place:

Williams: "So, OK, I wanna talk to you about something, OK?"

Defendant: "What's that?"

Williams: "All right, Like, I was thinking a lot about, like, yesterday, and, like, when we saw each other, which I am so happy about –

Defendant: "Yeah."

Williams: " – and, like, I was thinking about, like, the trouble you're in and, like, the problems, and, like, I feel really bad for you, because, like, you're in there, and, like, you shouldn't be."

Defendant: "Yeah, I know."

Williams: "And, like, I wanna help you, you know I'm always there for you and, like, you know I'm always gonna be there for you and I'll do anything for you, you know, 'cause I want us to be together and I, you know, you know how much I love you."

Defendant: "Yeah, I know."

Williams: "And, you know, I care about you and, like, I actually have been saving a lot of money * * * from, like, where I work, 'cause I make, like, really good money there –

Defendant: "Really?"

Williams: " – because you know how I've always been able to do hair and makeup really good?"

Defendant: "You're so good at that."

Williams: "Thank you. * * * I get a lot and, like, I've been saving up a lot of money, so I wanna do this thing for you with [Mottier], you know, and since that other girl [Karels] was too much of a pussy and didn't want to help you and,

you know, be there for you. I told you, you know, that girl ain't got shit on me, you know."

Defendant: "I know, baby, but [inaudible] have your friends [inaudible]."

* * *

Williams: "I already talked to them about it. And I told them about, like, what you wanted to do and, like, having them do it. And it would be easier to do – It would be so much easier to – 'Cause I have the $350, I have more than that."

Defendant: "Right."

Williams: "And like –

Defendant: "I just – "

Williams: " – if you want, like, for me to do it, 'cause, like, check this out, like, I have the money. Me and, like, my guys can go meet this guy, you know, and everything like that. Or this girl. Is it a guy?"

* * *

Defendant: "Oh, this guy Tony? Yeah, it's a guy."

Williams: "It's a guy. OK, like, I can go and meet him and have, like, people with me in case, you know, 'cause, in case something goes down or whatever. Which I don't think it will."

Defendant: "Right."

Williams: "And, like, you know, if you want this done, I can do it for you, 'cause you're in there, and you can't do – It's not like you can go

over to, like, you know, [Mottier's] house and just do it yourself, you know."

Defendant: "Right."

Williams "So . . . "

Defendant: "Well, uh, I mean, I can give – I can get your people, like, the address too. But, see, here's the thing, I would rather have you save that money for, like, an apartment or something for us to live in."

Williams: "I will have more money, though. I mean – If you saw my bank account, it's like, huge. $350 isn't shit."

* * *

Defendant: "Well, $350 isn't that much."

Williams: "I mean, it's up to you, Adam, But, I mean, I just wanna be there for you and help you."

Defendant: "I just don't want you, like, I don't know. I mean –

Williams: "Like, if you want it done – "

Defendant: "It wouldn't be a waste, but at the same time it kinda would. Like, his life to me isn't worth $350."

* * *

Williams: "But taken care of, it is. [Inaudible] I'm just trying to help you, since no one else seems like they want to and I'm proving that I'm gonna be there for you and that I love you and it's like you don't care."

Defendant: "No, I do care. I really appreciate it. But like I said, I don't know. It would be better if, like, we could have a place to live when I get out."

Williams: "We already do."

Defendant: "We do?"

Williams: "Yeah. That's what I was trying to tell you yesterday and Sunday, when you're like, 'I'm not allowed to be at my parents' house any more; I'm only allowed to be a visitor,' you know. And I was like, 'Don't even trip about that,' you know. I was like, 'I got you when you out.'"

Defendant: "Baby, you're so good. I'm so – I'm so glad, like, you're back in my life. I've been, like, so happy since – since Sunday when you came and just shocked the hell out of me I was like, 'Oh my God.'"

* * *

Williams: "All right, but, like, like I said, I got the money. I have enough money to help you out in there and everything like that, and, and I still have tons of money for a place, you know, everything like that, and for myself, so, you know I'm here for you. You know I'll do it. You just gotta let me know."

Defendant: "OK Well, then, I'll, uh, I'll talk to [Garvin] and – you know, set up a time for you to meet this guy."

Williams: "All right."

Defendant: "OK [Inaudible] I just, you know what?"

Williams. "I – "

Defendant: "I wanted you to make sure. Like, I don't want you getting, like – "

Williams: "No, I – [Inaudible] you know I'm down for this shit. You know I do this shit all the time. You know, like, I'm there for my friends, so it's not like, you know, I've never been there for my friends and everything like that, you know."

Defendant: "But – No, I know I know. I know you're [inaudible] for me too. I know, And I'm gonna make up to you, baby."

Williams: "No, you don't have to."

Defendant: "Well going to anyway."

Williams: "Where would I, like, meet this guy?"

The two then discussed the time and place of the meeting and how much money Williams was to bring to give Tony. Williams gave defendant her cell phone number, and defendant stated that he would have Garvin talk to Tony to arrange the details of the transaction. They then continued:

Williams: "How do they know [Mottier]?"

Defendant: "They don't. I just gave them the address."

Williams: "Oh, you just gave him his home address?"

* * *

Defendant: "I got his address, his birthday, I got all that shit, Fucking' – "

Williams: "OK"

Defendant: " – in my discovery. 'Cause they're stupid. They like, fuckin' somebody snitches on you and they give * * * all * * * their information."

* * *

Williams: "Will they kill [Mottier]?"

Defendant: "Yeah."

Williams: "They will kill [Mottier]?"

Defendant: "Yeah, I already told them how to do it."

Williams: "Do you trust them to kill [Mottier]?"

Defendant: "Oh, yeah."

At that point, defendant summoned Garvin and told him to call Tony while defendant remained on the phone with Williams. After a short time, Garvin returned with instructions that Williams was to bring $500 to Tony at 4 p.m. that afternoon at a specified location.

The State's final tapes depicted Williams telling defendant that she delivered the money and defendant indicating that he will be happy to see the news of Mottier's killing on the television and defendant instructing Tony as to how to execute Mottier.

After deliberation, the jury found defendant guilty of solicitation of first degree murder. The jury rejected defendant's entrapment defense.

Defendant raises three issues in relation to his solicitation for murder conviction. First, defendant argues that the State did not prove the absence of entrapment beyond

a reasonable doubt. Once an accused presents even slight evidence of entrapment, the State must prove the absence of entrapment beyond a reasonable doubt. *People v. Arndt,* 351 Ill. App. 3d 505, 515 (2004). In order to establish entrapment, the evidence must show (1) that the State improperly induced the defendant to commit the crime; and (2) that the defendant was not predisposed to commit the crime *Arndt,* 351 Ill. App. 3d at 516. The question of whether a defendant has been entrapped is a factual question to be decided by the trier of fact. *People v. Watycha,* 272 Ill. App. 3d 774, 781 (1995). The relevant question for a reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the absence of entrapment to be proven beyond a reasonable doubt. *People v. Chism,* 248 Ill. App. 3d 804, 812 (1993); see *Peoples v. Collins,* 106 Ill. 2d 237, 261 (1985).

Entrapment is not established where there is any substantial evidence from which it may be inferred that the criminal intent to commit a particular offense originated in the mind of the accused. *People v. Latona,* 268 Ill. App. 3d 718, 726 (1994). Generally, predisposition is established by a defendant's willingness to participate in criminal activity before his initial exposure to government agents. *Latona,* 268 Ill. App. 3d at 726.

Here, there was ample evidence to support a finding that defendant was predisposed to commit the solicitation of murder crime for which he was convicted, and, thus, there was ample evidence for the jury to find that the State proved the absence of entrapment beyond a reasonable doubt. The State presented evidence that defendant approached several people in his search for someone who would murder Mottier until he eventually enlisted

Garvin's assistance. It also produced evidence of defendant attempting to set up Mottier's murder before withdrawing due to lack of money. The above-quoted conversations demonstrate that he retained a desire to see Mottier murdered even after August 13, when defendant purportedly withdrew from the plan.

Defendant quotes excerpts from the taped conversations between defendant and Williams in arguing that she induced him into ordering the murder after he had already declared to Garvin that he wished to withdraw. However, our review of the recorded conversations leads us to the almost unavoidable inference that the only reason defendant withdrew from the plan initially was because he could not convince Karels to lend him $350 and that, throughout the entire time period in question, he sought to have Mottier killed. The August 13 and 14 conversations also support the inference that the only reason defendant expressed any reservations to Williams about having Mottier killed is that he preferred that Williams carry out the murder, either herself or by enlisting the help of members of her street gang. Thus, the State (through Williams) may have offered defendant an opportunity to commit the crime, but, viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found beyond a reasonable doubt that defendant was predisposed to commit the crime of solicitation of murder.

Defendant also argues that Garvin approached him about killing Mottier and thus that his desire to have Mottier killed arose out of Garvin's prodding and not his own predisposition. However, the State correctly points out that the State offered testimony to show that Garvin

approached defendant only after hearing defendant ask other inmates to help him kill Mottier.

Defendant relies on *People v. Karraker,* 261 Ill. App. 3d 942 (1994), to support his argument that the State entrapped defendant. However, as even defendant notes, the State in *Karraker* "presented no pertinent evidence that the defendant was predisposed to [commit the crime] prior to being approached by the government agent." *Karraker,* 261 Ill. App. 3d at 954. As noted, the State in this case presented substantial evidence that defendant was predisposed to commit the crime for which he was convicted.

Defendant also argues that he did not actually want to carry out the plan to kill Mottier and that his recorded assertions to the contrary were simply "a function of jail talk." We find this claim highly dubious, especially in light of the fact that defendant made the same culpable declarations to Williams and Karels (who were not in jail) as he did to Garvin. Therefore, we find that a rational jury could have discredited defendant's argument that his solicitation was mere puffery, and we affirm the jury's finding that defendant was not entrapped. See *Collins* 106 Ill. 2d at 261 (relevant question is whether any rational jury could have found all the elements proven beyond a reasonable doubt).

Defendant's second argument on appeal of his solicitation conviction is that the trial court erred in allowing the State to present details of the arson case during his trial in the solicitation case. Before the solicitation trial began, defendant sought to have evidence of the arsons excluded from the solicitation trial as being unduly prejudicial. The trial court allowed defendant's motion in

part and excluded defendant's videotaped arson confession, evidence that defendant was convicted in the arson case, and the testimony of defendant's parents unless relevant in rebuttal. However, it allowed the State to introduce evidence that defendant confessed to the arson and that Mottier served as an informant to police in their arson investigation. It also played a recording of defendant's conversation with Mottier to the jury.

The decision on whether to admit evidence is within the sound discretion of the trial judge and will not be disturbed in the absence of a clear abuse of discretion *People v. Abraham,* 324 Ill. App. 3d 26, 34 (2001). Evidence showing a defendant's motive is relevant and admissible (*Smith,* 141 Ill. 2d 56), and a trial judge may properly allow evidence of other crimes by the defendant when such evidence is probative of the defendant's motive to commit the crime on trial (*Abraham,* 324 Ill. App. 3d at 34-36). Here, the trial court, in its discretion, decided to allow some limited evidence concerning the arson. It did so even after hearing defendant's argument that the evidence would be irrelevant and unduly prejudicial. We agree with the trial court that the evidence was probative of defendant's motive to have Mottier killed, and we find the trial court's assessment of the prejudicial effect of the proffered evidence to be correct, especially in light of the fact that the trial court did exclude some evidence of the arson from the jury's consideration. We hold that the trial court did not abuse its discretion in allowing the limited arson evidence.

Defendant's third argument on appeal of his solicitation conviction is that the trial court erred in allowing the State to present Mottier's testimony despite the fact that Mottier was not disclosed as a witness before trial.

Defendant argues that the State has a duty to disclose all witnesses or potential witnesses to the defense (*People v. Hanna,* 120 Ill. App. 3d 602 (1983)), and defendant asserts that the trial court abuses its discretion where the defendant has been surprised or prejudiced by the State's violation of discovery (*People v. Shiflet*, 125 Ill. App. 3d 161, 180 (1984)). However, when the State announced that it was going to call Mottier as a witness, the trial court specifically asked defendant's counsel if he was surprised and prejudiced by Mottier's addition to the list or whether he could proceed with the trial. During that conversation, the following colloquy took place:

> [Defense Attorney]: "I don't believe I articulate [sic] the fact that Mr. Mottier was not listed * * * as a witness in the State's disclosure in this case."
>
> Court: "Acknowledge that."
>
> [Prosecuting Attorney]: "Yes."
>
> Court: "Are you surprised by the fact that he's being called as a witness[?] [You] [f]iled a motion in limine prior to testimony."
>
> [Defense Attorney]: "I'm surprised, I filed a motion in limine to bar testimony. I anticipated the State might be in some way trying to get into what he had said or his tape for that matter. I want to make sure that would come out."
>
> Court: "Are you prepared to cross-examine him? You recall that I limited pretty much what he's going to testify about."
>
> [Defense Attorney]: "Certainly."
>
> Court: "Are you prepared to go forward is what I want to know?"

> [Defense Attorney]: "The tape is the tape."
>
> Court: "That doesn't make any difference. Still have to say who you're going to call. Are you surprised? Are you unable to proceed?"
>
> [Defense Attorney]: "I'm not unable to proceed any further than the arguments that I made yesterday regarding his testimony and the appropriateness at this trial. Certainly I knew what he had to say. I've heard the tape. Obviously we did this [arson] trial two weeks ago."

The above conversation makes clear that defendant was neither surprised nor prejudiced by Mottier's addition to the witness list, and we reject defendant's argument to the contrary.

Defendant also argues that his sentences were excessive. At the sentencing hearing, the trial court heard testimony in aggravation from a prison guard, who testified that defendant punched and kicked him and also had other behavioral problems in prison; and defendant's neighbor, who read a victim impact statement regarding the arson case. In mitigation, the trial court heard the testimony of defendant's former employer and several of defendant's relatives. On his own behalf, defendant made a statement in which he expressed sympathy and sorrow to the victims of his crimes and contrition to Mottier for the "position [he] put [Mottier] in." Though defendant did not admit his guilt of the crimes for which he was convicted, he did acknowledge that he "brought all of this upon [him]self."

After hearing the evidence and arguments from both sides, the trial court announced defendant's sentence. It stated that it looked at the factors in aggravation and

mitigation, and it opined on the "eloquent" letters it had received on defendant's behalf. The trial court also noted defendant's criminal history, which included "virtually all alcohol or drug-related offenses" and the "yet unresolved" battery charge against defendant. The judge then commented on the "circumstances of the solicitation to commit murder" as well as "the circumstances including the various demeanors that [defendant] exhibited at trial." Finally, the court noted that it considered defendant's statement on his own behalf. After reciting the sentencing range for solicitation for murder for hire, 20 to 40 years, the court sentenced defendant to 24 years' imprisonment. After reciting the sentencing ranges for arson and aggravated arson, 3 to 7 years and 6 to 30 years respectively, the court sentenced defendant to 6 years and 10 months for the arson to run concurrently with a 15 year sentence for the aggravated arson.

A trial court's sentencing decisions are entitled to great deference and weight. *People v. Streit*, 142 Ill. 2d 13, 18-19 (1991). A trial judge is in a far better position than an appellate court to fashion an appropriate sentence, because the judge can make a reasoned judgment based upon firsthand consideration of such factors as the defendant's character, mentality, social environment, habits, and age; whereas the appellate court must rely entirely on the record. *Streit,* 142 Ill. 2d at 19, quoting *People v. Dukett,* 56 Ill. 2d 4432, 452 (1974). A trial court's ruling in imposing a sentence will not be altered on review unless the trial court abused its discretion. *Streit,* 142 Ill. 2d at 19. A reviewing court must not substitute its judgment for that of a sentencing court merely because it would have weighed the sentencing factors differently. *Streit,* 142 Ill. 2d at 19. A sentence within the statutory limits will not be

deemed excessive or an abuse of discretion unless it is greatly at variance with the spirit and purpose of the law or obviously disproportionate to the nature of the offense. *People v. Fern,* 189 Ill. 2d 48, 54 (1999).

We find no abuse of discretion in the trial court's consideration of the applicable sentencing factors or in its imposing sentences within the statutory limits. As noted above, the trial court considered the many factors in mitigation and aggravation before announcing its sentencing determinations. We find the trial court's consideration of the relevant factors to have been appropriate.

Defendant argues that the State made several improper arguments at the sentencing hearing when it referred to the possibility that defendant's neighbors could have been killed when defendant burned their home. However, in imposing defendant's sentences, the trial court stated that "to the extent that the argument is that two or more people could have died, that's not what it is. * * * The jury found what he did do and I'll sentence him for what he did do." Because the trial court expressly disavowed the argument about which defendant complains, we find no error.

Therefore, we affirm defendant's sentences in both the arson and the solicitation cases.

The Aggravated Battery Case: No. 2-04-0249

Defendant also brings an interlocutory appeal in his prosecution for aggravated battery of a prison guard. Defendant argues that, because the state presented the factual basis of defendant's pending aggravated battery charge as an aggravating factor in defendant's sentencing

for arson and solicitation of murder, any further prosecution of the aggravated battery charge would violate the double jeopardy prohibition against multiple punishments for the same offense and thus the aggravated battery charge against him must be dismissed. See *Illinois v. Vitale,* 447 U.S. 410, 415, 100 S. Ct. 2260, 2264, 65 L. Ed. 228, 235 (1980). However, the State correctly notes that "it [does not] violate double jeopardy principles for a defendant to be convicted and sentenced for a crime even though the conduct underlying that offense has been considered in determining the defendants sentence for a previous conviction." *People v. Blue,* 207 Ill. 2d 542, 549 (2003) citing *Witte v. United States,* 515 U.S. 389, 398, 132 L. Ed. 2d 351, 363, 115 S. Ct. 2199, 2205 (1995). Therefore, defendant's argument is without merit.

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed. Affirmed.

O'MALLEY, P.J., with HUTCHINSON and BYRNE, JJ., concurring.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 25, 2006

Mr. James Patrick Yetter
Bruca & Yetter, P.C.
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No. 101701 – People State of Illinois, respondent, v. Adam Palinski, petitioner. Leave to appeal, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 16, 2006.